Supreme Court, U.S.
FILED
04-10019 NOV 23 2004
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

GURMEET SINGH DHINSA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For The Second Circuit
(2nd Circuit No. 04-0427)

Circuit Court Judges: Cabranes, Straub and Wesley

PETITION FOR WRIT OF CERTIORARI
APPENDIX

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MANDATE

E.D.N.Y.(bkny,
02-cv-6156
Korman, J.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in theCity of New York, on the 26th day of August two thousand four,

Present:

Hon. José A. Cabranes,
Hon. Chester J. Straub,
Hon. Richard C. Wesley,
Circuit Judges

UNITED STATES
COURT OF APPEALS
FILED AUG 26 2004
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

Gurmeet Singh Dhinsa,
Petitioner-Appellant,

04-0427-pr

v.

United States of America and Al Herrera, Warden,
United States Penitentiary in Lompoc, California,
Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed because appellant's 28 U.S.C. § 2255 motion was time-barred. *See* 28 U.S.C. § 2255.

FOR THE **COURT:**
Roseanu B. MacKechnie, Clerk

By: s/Richard Alcantara
Richard Alcantara, Deputy Clerk

AUG 26 2004

SAO-LFR

A TRUE COPY
ROSEANN B.MACKECHNIE, CLERK

ISSUED AS MANDATE:
NOV 3 2004

NOT FOR PUBLICATON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

GURMEET SINGH DHINSA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM & ORDER
02-CV-6156(ERK)
97-CR-0672(ERK)

----------X

Korman, Ch. J.

On October 28, 2003, I ordered petitioner to show cause why the petition should not be dismissed because his delay in filing the petition made it impossible to reconstruct the factual circumstances underlying his claim of ineffective assistance of counsel. Petitioner's response to my inquiry on his delay in filing the petition relied in part on the fact that his petition was filed within the prescribed one-year period of limitations. The petition was filed three years after he was sentenced. The applicability of the doctrine of laches applies precisely to a case in which the action is filed within the statute of limitations. Otherwise the doctrine would serve no purpose. Nevertheless, petitioner's response caused me to examine the history of the case to determine whether the petition was timely filed.

The Supreme Court denied the petitioner a writ of certiorari on October 1, 2001. Dhinsav. United States, *534* U.S. 897, 122 S.Ct. 219 (2001). The petitionwas not

filedhere until November 20, 2002. This was more than one year after the petition was denied. While petitioner filed a petition on September 16,2002, in the Central District of California, which was styled as a petition pursuant to 28 U.S.C. § 2241, it was dismissed without prejudice for lack of jurisdiction because it should have been filed in the Eastern District of New York as a petition pursuant to 28 U.S.C. § 2255.

The period of time during which the petition was pending in California did not toll the statute of limitations. Rodriguez v. Bennett, 303 F.3d 435 (2d. Cir. 2003). Nevertheless, the doctrine of equitable tolling may be applied to the period in which the petition was pending and decided in the Central District of California. Even so, the petition is untimely. The petition was filed in California on September 16, 2002, it was dismissed on October 2, 2002, and petitioner received notice of the dismissal on October 7, 2002. See Letter of Barry A. Kozyra, dated December 29, 2003. Because he waited until he had only 14 days left to file his habeas petition in California, petitioner had 14 days from October 7, 2002 to refile his petition here. Instead, without any explanation for the delay, he waited until November 20, 2002 to do so.

Under the circumstances, the petition must be dismissed because it was not timely filed. Petitioner's implicit suggestion that it was somehow improper for me to raise the issue sua ponte is without merit. The Second Circuit has recognized that, while defenses which are required to be raised by Fed. R. Civ. P. 8(c) "are 'ordinarily' not to be recognized 'when not raised in the answer, Davis v. Bryan, 810 F.2d 42, 48 (2d Cir.

1987) (district court ordinarily should not raise statute of limitations sua sponte), no absolute bar to the consideration of such claims exists. See Carbonell v. Louisiana Dep 't of Health and Human Resources, 772 F.2d 185, 189 (5th Cir. 1985) (court may dismiss sua sponte on res judicata grounds provided it has before it 'all relevant data and legal records' or is in the same district in which the original action was filed)." Salahuddin v. Jones, 992 F.2d 447, 449 (2d Cir. 1993) (emphasis added). The United States magistrate had held in Salahuddin that the defendants waived the defense of res judicat, by failing to raise it in the pleadings. Nevertheless, citing the need to avoid unnecessary relitigation, he dismissed the claims on res judicata grounds. Id. 449. The Court of Appeals upheld the dismissal.

Subsequently, in Pino v. Ryan, 49 F.3d 51 (2d Cir. 1995), then-Chief Judge Newman observed the reason for the rule against dismissing a complaint sua sponte past the point at which the defense is normally required to be raised, is that a sua sponte dismissal may be unfair to the plaintiff by rejecting the suit after considerable time and expense has been invested in it." Id.at 53. (emphasis in original) Nevertheless, he concluded that, even where the issue is raised sua sponte after an answer has been filed, Salahuddin "explicitly upheld a court's authority to do so even in that context." Id.at 54.

The statute of limitations defense in this case, while raised sua sponte after the answer was filed, did not involve a rejection of the "suit after considerable time and expenses has been invested in it by plaintiff." Indeed, plaintiff expended no more time or effort in it,

than if the issue had been raised sua sponte after he filed the petition and before the answer — which clearly would have been appropriate. Acosta v. Artuz, 221 F.3d 117 (2d Cir. 2000). Indeed, having been afforded the opportunity to explain the untimely filing, petitioner can cite no prejudice he suffered because of the timing of sua sponte action.

On the other hand, the statute of limitations enacted by Congress reflects compelling considerations of policy. Delay in filing a petition often makes a retrial impossible, if such relief is given, and it may make it difficult to reconstruct circumstances necessary to resolve the petition. As the Second Circuit has held:

> The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while, the record is fresh, and lends finality to state court judgments within a reasonable time. Like the other procedural bars to habeas review of state court judgments, the statute of limitation implicates the interests of both the federal and state courts, as well as the interests of society, and therefore "it is not inappropriate for the court, on its own motion, to invoke the doctrine."

Acosta v. Artuz, 221 F.3d at 123. Fed. R. Civ. P. 8(a) is applicable here only to the extent that it may be "appropriate," Federal Rules Governing Section 2254 Cases, Rule 11; it does not warrantundermining these compelling considerations of policy. Nor would it, even it did apply in the same way as it applies to civil cases.

Because I decide the issue petition on the ground that it was not timely filed, I need not address the merits of petitioner's claim, whih seem to be wholly lacking, or the defense of laches.

The petition is dismissed. I deny a certificate of appealability.

SO ORDERED:

S/Edward R. Korman

Edward R. Korman
United States Chief District Judge

Brooklyn, New York
December 31, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

GURMEET SINGH DHINSA, JUDGMENT
02-CV- 6156 (ERK)

Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

X

A Memorandum and Order of Honorable Edward R. Konnan, United States District Judge, having been filed on December 31, 2003, dismissing the petition for a writ of habeas corpus; and denying a Certificate of Appealability; it is

ORDERED and ADJUDGED that petitioner take nothing of the respondent; that judgment is hereby entered dismissing the petition for a writ of habeas corpus; and that a Certificate of Appealability is denied.

Dated: Brooklyn New York
Jahuary 06, 2004

S/ROBERT C. HEINEMANN
ROBERT C. HEINEMANN
Clerk of Court

FILED
CLERK. U S DISTRICT
COURT CENTRAL
DISTRICT OF
CALIFORNIA
BY DEPUTY

ENTERED
OCT 2 2002
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION
BY DEPUTY

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GURNEET SINGH DHINSA
Petitioner,
vs.
AL H.ERRERA,
Respondent.

Case No. Cv 02-7211-VAP (SGL)

ORDER RE SUMMARY DISMISSAL OF ACTION

On September 16, 2002, petitioner filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. It appears from the face of the petition that petitioner currently is a federal prisoner incarcerated at the United States Penitentiary in Lompoc, California, pursuant to a sentence imposed following petitioner's conviction on October 15, 1999, in the United States District Court for the Eastern District of New York by the Honorable Edward R. Korrnan, United States District Judge, for various racketeering - related offenses. Petitioner is challenging the legality of his conviction and sentence on the grounds that the

conviction was obtained without petitioner being properly instructed of his constitutional right to testify on his own behalf.

ENTER ON ICMS

OCT - 2 2002 OCT –2-2002

Under 28 U.S.C. § 2255

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentences, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

As the Supreme Court observed in United States v.Addonizio, 442 U.S. 178, 185 (1979), the statute "was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement, by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court."

In this regard, Section 2255 specifically provides that "[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this sectiont [] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the

legality of his detention." See, e.g., Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999) (affirming the district court's dismissal of a habeas petition collaterally attacking the validity of a conviction); Troati v. Henm, 843 F.2d 1160, 1162 (9th Cir. 1988). Here, the only reason proffered by petitioner as to why a Section 2255 motion would be ineffetive is that petitioner is presently incarcerated in the Central District and "the conviction and sentence were not decided by the California District Court." Petition at 5. Although petitioner's notes correctly that his conviction and sentence was imposed by the District Court for the Eastern District of New York and not the Central District of California, there is nothing about petitioner's presence in a federal prison in California which prevents him from bringing a Section 2255 motion in the sentencing court. Accordingly, the Court finds that petitioner has failed to make the requisite showing that Section 2255 is an inadequate or ineffective remedy.

IT THEREFORE IS ORDERED that this action be summarily dismissed for lack of jurisdiction. Any other relief being sought by petitioner herein (e.g., the application of a non-resident attorney to appear in a specific case) is DENIED as moot.

DATED: September 23, 2002

S/Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

Presented by:

s/Stephen G. Larson
STEPHEN G. LARSON
UNITED STATES MAGISTRATE JUDGE

FILED
CLERK, U.S. DISTRICT COURT
SEP 23 2002
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GURMEET SINGH DHINSA,

Petitioner,

vs.

AL HERRERA

Respondent.

Case No. CV 02—7211-VAP (SGL)

JUDGMENT

Pursuant to the Order Re Summary Dismissal of Action,

IT IS ADJUDGED that this action is dismissed forlack of jurisdiction

DATED: September 23, 2002

ENTER ON ICMS
OCT –2 2002

S/Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

FILED
CLERK U.S. DISTRICT COURT
SEP 16 2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

NAME GURMEET SINGH DHINSA
PRISON IDENTIEICATION NO. 53546-053
PLACE OF COFIEMENT U.S.P. Lompoc
3901 Klein Blvd.
Lompoc, California 43936

ATTORINEY Barry A. Kozyra, Esq.
Kozyra & Hartz. LLC
140 Eagle Rock Avenue
Roseland. New Jersey 07068

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER

GURMEET SINGH DHINSA CV 02-7211 VAP(SGL)

Petitioner,

v.

CR 97-CR-672(ERK)
(EASTERN DISTRICT
NEW YORK)

AL HERRERA

Respondent.

PETITION FOR WRIT OF HABEAS-CORPUS BY A PERSON IN FEDERAL CUSTODY (28 U.S.C. §2241)

INSTRUCTIONS - READ CAREFULLY

This petition shall be legibly handwritten or typewritten, signed by *the petitioner, under penalty* of perjury. You must set forth CONCISELY the answer to each question in the proper space on the form. Any false statement of a *material fact* may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition except that ONE separate additional page is permitted in answering Question No. 9.

Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

If you are seeking leave to proceed *in forma pauperis* (without paying the $5.00 filing fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inabilityto pay the fees and costs of the procbedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $25.00, you must paythe filing fee as required by the rule of the district court.

When the petition is completed, the original and 3 copies, must be mailed to the Clerk of the United States District Court for the Central District of California, United -States Courthouse, 312 North Spring Street, Los Angeles, California 90012, ATTENTION: Intake/Docket Section.

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.

Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY (28 U.S.C. §2241)

PLEASE COMPLETE THE FOLLOWING:
(check appropriate number)

This petition concerns:
1. X a conviction
2. X a sentence
3. jail or prison conditions
4. prison discipline
5. a parole problem
6. other

PETITION

1. Place of detention: **U.S.P. Lompoc, 3901 Klein Boulevard, Lompoc, California.**

2. Name and location of court which imposed sentence: **United States District Court, Eastern District Of New York.**

3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:

Indictment number 97CR-672:

a. **18 U.S.C. 1962(c) and 1963 Racketeering;**

b. **18 U.S.C. 1962(d) and 1963 Racketeering Conspiracy;**

c. **18 U.S.C. 1959 (a) (5), Conspiracy to Murder (3 counts);**

d. **18 U.S.C. 1959 (a)(1), Murder (2 counts);**

e. **18 U.S.C. 1512(a)(1)(C) and 1512 (A)(2)(a), Obstruction of Justice (2 counts);**

f. **18 U.S.C. 924(c), Using and Carrying a Firearm in Relation to Crimes of Violence;**

g. ***18 U.S.C. 1959* (a) *(4), Threat to Murder*;***

h. **18 U.S.C. 922(g)(1) and 924(a)(2), Felon in Possession of Firearms;**

i. **18 U.S.C. 371, Conspiracy to Commit Mail Fraud;**

j. **18 U.S.C. 1341, Mail Fraud (6 counts);**

k. ***18 US.C. 1201, Conspiracy to Kidnap*;***

l. ***18 U.S.C. 1201, Kidnaping****

***On appeal to the Court of Appeals for the Second Circuit, convictions for Threat to Murder, Conspiracy to Kidnap, and Kidnaping were remanded to the district court for a new trial. The government did not reprosecute on said issues.**

4. The date upon which sentence was imposed and the terms of the sentence:

a. **Petitioner was sentenced on October 15, 1999 by the Honorable Edward R. Korman, U.S.D.J., to life sentences on eight counts (including those offenses which were reversed and remanded on appeal to the Second Circuit) and to lesser terms on the remaiuing counts.**

5. Check whether a finding of guilty was made:

a. After a plea of guilty
b. X After a plea of not guilty
c. After a plea of nolo contendere

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

a. X Ajury
b. Ajudge without ajury

7. Did you appeal from the judgment of conviction of the imposition of sentence?

X Yes _No

8. If you did appeal, give the following information for each appeal:

CAUTION: *If you- are attacking a sentence imposed under a federal judgment, you must first file a direct appeal or motion under 28 U.S C.§ 2255 in the federal court which entered the judgment.*

a. (1) Name of court: **U.S. Court of Appeals for the Second Circuit**
(2) Result: **Affirmed in part, Remanded in part**
(3) Date of result: **March 21, 2001**
(4) Citation or number of opinion: **Docket No. 99-1682**
(5) Grounds raised (list each):

(a) **The district court erred by admitting the hearsay statements of two murder victims pursuant to United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), and its progeny, and Fed. R. Evid. 804(b) (6);**

(b) **There was insufficient evidence to establish that Petitioner acted "for the purpose of maintaining or increasing [his] position" as provided in 18 U.S.C. § 1959(a);**

(c) The district court erred by admitting the testimony of the girlfriend of one of the murder victims;

(d) Following Petitioner's motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 and at the sua sponte suggestion of the district court, the indictment was improperly amended by the Grand Jury to include charges of interstate kidnaping in place of kidnaping in aid of racketeering;

(e) There was insufficient evidence to support the jury's convictions for interstate kidnaping;

(f) A new trial was warranted on the racketeering counts because Petitioner's convictions on a number of the predicate crimes were invalid;

(g) There was insufficient evidence to support a conviction for coercion in the first degree, in violation of N.Y. Penal Law § 135.65;

(h) There was insufficient evidence to support a conviction on the felon-in-possession of a firearm charge; and

(i) The district court erred by admitting the evidence obtained from the search of Petitioner's car following his July 7, 1997 arrest.

9. State CONCISELY every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, attach a SINGLE page only behind this page.

CAUTION: *If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds* at a later date. You must

state facts, not conclusions in support of your grounds. A rule of thunib to follow is - who did exactly what to violate your rights at what time and place.

a. Ground one: **Conviction obtained without claimant being properly instructed of constitutional right to testify.**

b. Supporting Facts: **Claimant is a United States resident alien with no true familiarity with the American legal, system. He was tried and convicted on a nunber of counts, including racketeering and murder. Nearly all evidence produced at trial was circumstantial in nature. Claimant was not properly instructed by his attorney or the court of his constitutional right to testify in his own behalf. (See *Certification of Gurmeet Singh Dhinsa, attached hereto as Exhibit A).***

10. Have you file previous petitions for habeas corpus, motions under Section *2255* of Title 28, United States Code, or any other applications, petitions or motion with respect to this conviction? ___Yes __X__ No

11. If your answer to Question No. 10 was yes, give the following information:
Not applicable.

12. If you did not file a motion under Section *2255* of Title 28, United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

Conviction and sentence imposed by the United States District Court, Eastern District of New York. However, petitioner was immediately transferred for detention at the U.S.P. Lompoc, which is located within the Central District of California, where he remains to date. As such, motion under 28 U.S.C. § 2255 would be an ineffective means of remedy as the conviction and sentence were not decided by the California District Court.

13. Are you presently represented by counsel? X Yes No

If so, provide name, address and telephone number:
Barry A. Kozyra, Esq.
Kozyra & Hartz, LLC
140 Eagle Rock Avenue
Roseland, New Jersey 07068

Case Name and Court: **Present matter only.**

14. If you are seeking leave to proceed in forma pauperis, have you completed the declaration setting forth the required information? Yes X No

WHEREFORE, petitioner prays that the court grant relief to which he may be entitled in this proceeding,

s/Barry A. Kozyra 9/11/02

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
Date Signature of Petitioner

Gurmeet Singh Dhinsa does hereby certify as follows:

1.) I was born in Punjab, Moron, India on May 4, 1962. I graduated from high school in India. I was not taught English nor did I have any knowledge of the American legal system while in India.

2.) I came to the United States when I was 20 years old. I learned English while working starting as a restaurant delivery boy and later as a service station attendant. I had no further education in the United States.

3.) In July 1997 I was arrested and held at the Metropolitan Detention Center for approximately six (6) months. I was transferred later to the Metropolitan Corrections Center where I remained until the end of my federal trial in March 1999.

4.) From the start of my trial, I was subjected to unsatisfactory procedures and conditions at the Metropolitan Corrections Center. I would be deprived of sleep daily. Many nights I had four hours or less of sleep. I would be awakened at three or four a.m. on trial days and returned to my cell after 9:00 p.m. I would miss meals which conflicted with the travel schedule. I had flu like symptoms and a cough and could not get medication needed by me because I was on trial.

5.) Prior to this case I was involved in only one trial which went to a jury. (On another occasion a plea was struck during trial.) In the case which went to the jury, there was no reason for me to testify because testify because I did not contest the key fact, my possession of a gun.

6.) Following the eight week trial, I was convicted on 20 of 29 counts in the indictment. Two counts were reversed by the Second Circuit on appeal.

7.) I wanted to testify at the trial. I would not have disputed the charges involving mail fraud and weapons possession.

8.) However, I would have disputed the testimony of the Government's witnesses as to conspiracy, racketeering, murder and kidnapping.

9.) At various times during trial, I stressed my desire to testify on my own behalf to my defense counsel. On each occasion, I was told, "hold on" "let's see how it goes" or words to similar effect.

10.) I accepted this direction because I was told by the court that I had to speak through defense counsel. I thought I had to listen to what defense counsel told me I must do.

11.) For example, during the trial a question arose as to whether a witness could identify my voice. I was told by my defense counsel that I was not to participate in a voice identification procedure during the trial. I asked to do so and my defense attorney then said he would allow it. I thought that he had to decide such matters, not me. As directed I communicated through defense counsel.

12.) Just before the trial ended, I told my defense counsel that I wanted to testify and to have other evidence presented at trial. I was told, "we'll see tomorrow."

13.) At the time, I did not realize the decision to testify or not was my own to make.

14.) The next morning, I was told "we don't want you to testify." No other reason was given to me by Gerry Shargel who gave me that decision. As I believed that it was his decision, not mine, I felt I had no choice but to accept it. The trial judge never asked me whether I wanted to testify or told me it was my right to decide, not my attorney's. I was not asked if I wanted to give up that right. I did not try to ask the trial court any question since I was told to direct communications to my lawyer.

15.) Mr. Shargel also refused to call Walter Johnson, a boyhood friend of one of the Government's key witnesses, Marvin Dodson. My attorney had secured

an affidavit from Mr. Johnson which stated that Mr. Dodson had lied about my involvement in the crimes he admitted committing (murders of Satinderjit Singh and Manmohan Singh). I could have established that I was never present at the scene of Satinderjit Singh's killing through one of the witnesses to the killing and others who knew my whereabouts elsewhere at that time. My attorney ignored that evidence and chose not to present those witnesses whom I wanted to testify.

16.) Had I been allowed to testify, I would have stated that I did not know Satinderjit Singh, he did not work for me and I never spoke with him on the telephone or in person.

17.) Similarly, I did not know Manmohan Singh, he did not work for me and I never spoke with him on the telephone or in person. While others may have had a dispute with him, I did not know him or care.

18.) As to Balwant Singh, I did not know him, he did not work for or with me and I never spoke with him on the telephone or in person. I had wanted Surinder Parmar to be called as a witness because he would have corroborated that I never asked him to deliver any message to Balwant Singh and that he never did so. I do not know why my attorney would not call him as a witness. I certainly did drive a car in his neighborhood because I had business nearby but it had nothing to do with him or anyone involved in the case.

19.) As to Sarvjeet Singh, I did not know him, he did not work for me or with me and I never spoke with him on the telephone or in person. The murder he witnessed was committed by my brother, when I was in prison on the weapons charge in 1991.

20.) Mr. Shargel was certain that he had damaged the credibility of Marvin Dodson and I would be acquitted on the Satinderjit Singh and Manmohn

Singh offenses, including murder. He told me so. He said the same thing as to the Sarvjeet Singh charges. His only worry was on the Muchtir Ghuman kidnapping offenses (which were reversed on appeal).

21.) Had I been allowed the opportunity to testify and to have corroborating witnesses, I would have been able to present my defense that the case against me was the product of Government witnesses who had lied and exaggerated their testimony. If I knew that I could testify and that it was my decision, not that of my attorney, I would have taken the stand and told the truth. I would have been acquitted based on all of the evidence, not the partial evidence the jury heard.

I hereby testify and certify that the foregoing statements made by me are true. I am aware that if any statement is willfully false, that I am subject to punishment by law.

September 7, 2002 s/Gurmeet Singh Dhinsa
Gurmeet Singh Dhinsa

Swore to and subscribed
before me on September 7, 2002
s/Barry A. Kozyra
BARRY A. KOZYRA

KOZYRA & HARTZ,LLC
140 Eagle Rock Avenue
Roseland, New Jersey 07068
973-403-8344
973-403-9652 (Telefacsimile) /
Attorneys fot Petitioner, Gurmeet Singh Dhinsa

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GURMEET SINGH DHINSA
Petitioner,

CASE NO. 97-CR-672 (ERK)

v.

AL HERRERA,
Respondent.

MOTION TO VACATE CONVICTION AND SENTENCE REMAND FOR NEW TRIAL

TO: Clerk of the United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York, NY 11201

PLEASE TAKE NOTICE that the undersigned hereby moves before the above named Court for an Order entitling Petitioner to an evidentiary hearing before this Court in support of this motion to vacate the conviction and sentence imposed by the Final Judgment and Order of the

United States District Court for the Eastern District of New York, entered November 5, 1999, which Order sentenced Petitioner to consecutive life sentences to the United States Bureau of Prisons, and remanding for a new trial.

This application is made pursuant to 28 U.S.C. § 2255.

In support of this motion, Petitioner shall rely upon the attached Certification of Barry A. Kozyra, Esq., dated November 18, 2002, and the Certification of Gurmeet Singh Dhinsa, dated September 7, 2002.

s/Barry A. Kozyra, Esq.
BARRY A. KOZYRA, ESQ.
Attorney for Petitioner, Gurmeet Singh Dhinsa
DATED: November 18, 2002

CERTIFICATION OF SERVICE

I certify that three copies of the within motion and moving papers were mailed this day to the Clerk of the IJnited States District Court of the Eastern District of New York.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoin statements made by me are willfully false, I am subject to punishment

DATED: November 18, 2002 s/Barry A. Kozyra, Esq.
BARRY A. KOZYRA, ESQ.
Attorney for Petitioner,
Gurmeet Singh Dhinsa

KOZYRA & HARTZ, LLC
140 Eagle Rock Avenue
Roseland, New Jersey 07068
973-403-8344
973-403-9652 (Telefacsimile)
Attorneys for Petitioner, Gurmeet Singh Dhinsa

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GURMEET SINGH DHINSA

Petitioner, **CASE NO. 97-CR-672 (ERK)**

v.

CERTIFICATION OF
BARRY A. KOZYRA, ESQ.

AL HERRERA

Respondent.

Barry A. Kozyra, Esq., hereby certifies as follows:

1. I am a member with the law firm of Kozyra & Hartz, LLC, and have been engaged to file an application under 28 U.S.C. § 2255 on behalf of Petitioner, Gurmeet Singh Dhinsa, in the above entitled action.

2. Petitioner is currently incarcerated at the United States Penitentiary in Lompoc, California, purauant to sentencing following conviction in the United States District Court for the Eastern Ditrict of New York.

3. This certification is made in support of Petitioner's application to vacate the conviction and. sentence imposed

per the Final Judgment and Qrder entered by the Honorable Edward R. Korman, U.S.D.C., on November 5, 1999. (**See Final Judgment and Order, attached hereto as Exhibit A**).

4. Petitioner was tried on a 29-count indictment and convicted on twenty counts following an eight week jury trial, including racketeering, kidnapping, and murder. On appeal to the Court of Appeals for the Second Circuit, counts of Threat to Murder, Conspiracy to Kidnap, and Kidnapping were reversed and remaided to the district court for a new trial. The Government has chosen not to re-prosecute on the reversed charges.

5. On September 16, 2002, this office filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on behalf of Petitioner in the United States District Court for the Central District of California. As previously noted, Petitioner is presently incarcerated in Lompoc, California, which is located in the Central District of California. (**See Petition for Writ of Habeas Corpus by a Person in Federal Custody, attached hereto as Exhibit B).**

6. On September 23, 2002, the Honorable Virginia A. Phillips, U.S.D.J., dismissed Petitioner's application for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 without prejudice for lack of jurisdiction, and citing that Petitioner should move for § 2255 relief in the sentencing court. (**See Order Re Summary Dismisal of Action, attached hereto as Exhibit C**). Since that date, we have invetigated further Petitioner's claims and have found additional evidence to support his application.

7. Petitioner is a United States resident alien with no true familiarity of the American legal system. (**See Certification of Gurmeet Singh Dhinsa, attached hereto as Exhibit D).**

8. A detailed review of the trial transcripts indicates that subatantiafly all evidence produced at trial was circumstantial in nature. (See **Transcript of Criminal Cause for Jury Trial Before the Honorable Edward R. Korman, U.S.D.J.**).

9. Throughout trial, Petitioner repeatedly stressed to his defense counsel the desire to testify in his own behalf in order to challenge the testimony of the Government's withesses as to his alleged acts of conspiracy, racketeering, murder, and kidnaping, and also sought to intioduce further evidence of his innocence (See **Exhibit D**).

1O. During the trial, the Government elicited witness testimony which Petitioner could have contradicted if he had been given the opportunity to testify. Several of these witnesses have extensive criminal records and had admitted that they had repeatedly committed perjury in the past. (See **Transcript of Criminal Cause for Jury Trial Before the Honorable Edward R. Korman, U.S.D.J.).**

11. Defense counsel proceeded through trial and closed the case without calling Petitioner as a witness in his own behalf, nor did he call other witnesses who Petitioner wished to testify on his behalf. (See **Exhibit D).**

12. Due to the Court's instuction to direct all communications through defense counsel, Petitioner did not believe is was his decision and constitutional right to tetify in his own behalf at trial. (See **Exhibit D).** He further believed that he could not address his desire to the Court unless his defense counsel agreed.

13. Petitioner was never instructed by his attorney or by the Court of his constitutional right to testify in his own behalf. **(See Exhibit D).**

14. In addition, defense counsel's failure to call several key witnesses to testify on Petitioner's behalf, despite Petitioner's instructions to do so, deprived Petitiotier of his constitutional right to produce witnesses in his favor.

15. Petitioner is currently serving life sentences for conviction on five counts of his indictment and lesser terms on the remaining counts. The life sentences are based on convictions on three counts of conspiracy to commit murder involving Satinderjit Singh, Manmohan Singh, and Sarvjeet Singh, and two counts of murder involving Satinderjit Singh and Manmohan Singh.

16. If he had been given the opportunity, Petitioner would have produced evidence that he was neither involved in the conspiracy to murder Satinderjit Singh, Manmohan Singh, and Sarvjeet Singh nor the murders of Satinderjit Singh and Manmohan Singh.

17. Petitioner would have produced evidence that he did not know any of the victims nor did not have any disputes with any of the victims, in contrast to testimony provided against him at trial. Further, Petitioner would have produced evidence that he was not present at the scene of any of the aforementioned criminal acts, in contrast to the testimony against him at trial.

18. In addition, Petitioner would have called witnesses to testify in his behalf that Petitioner was not involved in nor present at the scene of any of the aforethentioned criminal acts. Specifically, Petitioner would have called Margie Jackson, Surinder Parmar, and Walter Johnon to testify as to Petitioner's innocence.

19. Margie Jackson was present at the scene of the murder of Satinderjit Singh. She would have offered testimony that Petitioner was not present at the scene, in contrast to

tetimony given by Government witnesses at trial. Jackson had been identified by the Government as a trial witness, but was not produced as a witness by the Government or the defense. (**See Transcript of Telephone Conversation of Margie Jackson, dated January 15, 1999, attached hereto as Exhibit E).**

20. At trial, it was alleged that Surinder Parmar had been involved in the murder conspiracies of Satinderjit Singh and Sarvjeet Singh. Between July 2 and July 5, 1997, Parmar was abducted and harassed by police officers from the 115th Precinct in Queens, New York, regarding his involvement with Petitioner. Parmar was jailed, threatened, denied food and water, and denied counsel despite his repeated requests, for his failure to cooperate with the Government and to testify against Petititioner. Parmar later indicated that he would testify on behalf of Petitioner, but was not produced as a witness by the Government or the defense. (**See Memorandum of Defense Counsel, dated August 7, 1997, attached hereto as Exhibit F).**

21. Walter Johnson was incarcerated together with Marvin Dodson in the same unit at the Metropolitan Detention Center ("MDC") in or about late- 1997. Johnson and Dodson had also been childhood friends. Dodson testifled on behalf of the Government at trial as the main witness against Petitioner. Dodson in fact has admitted to committing the murders of Satinderjit Singh and Manmohan Singh. His testimony at trial implicated Petitioner in the above referenced criminal acts. (**See Transcript of Criminal Cause for Jury Trial Before the Honorable Edward R. Korman, U.S.D.J.).**

22. On or about December 21, 1998, Walter Johnson provided an affidavit detailing his conversations with Marvin Dodsoh in which Dodson admitted to the murder of Manmohan Singh. Dodson did not implicate Petitioner at that time for any involvement in said criminal act. Further,

Dodson indicated that he wished to kill Petitioner, also incarcerated in the MDC, for "ratting" on him. Dodson also bragged to Johnson that he would be released from prison for cooperating with the Government. Johnson was willing to testify at trial inPetititioner's behalf, but was not produced as a witness by the Govemtneiit or the defense. (**See Affidavit of Walter Johnson, attached hereto as Ethibit G**).

23. Petitioner hereby challenges the legality of his conviction and sentence on the grounds that the conviction was obtained without his being properly instructed of his constitutional right to testify in his own behalf and his constitutional right to produce witnesses in his favor.

24. This motion for relief is made pursuant to 28 U.S.C. § 2255.

25. Petitioner hereby requests an evidentiary hearing before the Court in support of this motion to vacate the conviction and sentence imposed by the Final Judgment and Order entered November *5,* 1999.

26. In order to properly represent the interests of my client, I would request an appropriate transfer of Petitioner from his current site of incarceration in Lompoc, California, to another facility within the United State Bureau of Prisons within the jurisdiction of the Eastern District of New York no less than sixty days prior to an evidentiary hearing on this matter.

I HEREBY CERTIFY that the foregoing statements made by me are true. I am aware that if any of the statements I have made are willfully false, I am subject to punishment.

s/Barry A. Kozyra
BARRY A. KOZYRA

DATED: November 18, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA VS.	JUDGMENT INCLUDING SENTENCE FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987 CASE NO.: CR-97-0672(S-7)--01
GURMEET SINGH DHINSA	

Benton Cammbell & Catherine Freisen, Esqs.
Assistant United States Attorney

Bernadette Infantas
ESR

Gerald Shargel & David Ruhnke, Esqs.
1585 Broadway, 19th Floor -
New York. N.Y. 10036
Defendant's Attorney

The defendant:

X was found quilty on counts 1 – 5, 7 – 11, 14 –24 Superseding Indictment after a plea of not guilty. Accordingly, the defendant is ADJUDGED guilty of such Count(s), which involve the following offenses:

TITLE AND SECTION	NATURE AND OFFENSE	COUNT NUMBERS
T:18, USC, §1962(c) & 1963	Racketeering	ONE(1)
T:18, USC, §1962(d) & 1963	Racketering Conspiracy	TWO(2)

T:18, USC, § 1959(a)5)	Conspiracy to Murder Satinderjit Singh	THREE(3)
T:18, USC, §1959(a)(1)	Murder of Satinderjit Singh	FOUR(4)
T:1S, USC, §1512(a)(2)(C) & 1512(a)(2)(A)	Obstruction of Justice in the Murder of Satinderjit Singh	FIVE(5)
T:18, USC, §1959(a)(5)	Conspiracy to Murder Manmohan Singh	SEVEN(7)
T:18, USC, §1959(a)(1)	Murder of Manmohan Singh	EIGHT(8)
T:1S, USC, §1512(a)(2)(C) & 1512(a)(2)(A)	Obstruction of Justice in the Murder of Manmohan Singh	NINE(9)
T:18, USC, §924(c)	Using and carrying a firearm in relation to crimes of violence	TEN(10)
T:18, USC, §1959(a)(4)	Treat to murder Balwant Singh	ELEVEN(11)
T:18, USC, §1959(a)(5)	Conspiracy to Murder Savett Singh	FOURTEEN(14)
T:18, USC, §922(g)(1) & 1515 (A)(2)(a)	Felon in possession of firearms	FIFTEEN(15)
T:18, USC, §371	Conspiracy to commit mail Fraud	SIXTEEN(16)
T:18, USC, §1341	Mail Fraud	SEVENTEEN(17) THRU TWENTY -TWO(22)

T:18, USC, §1201	Conspiracy to kidnap Muchtir Ghuman	TWENTY-THREE(23)
T:18, USC, §1201	Kidnapping of Muchtir Ghuman	TWENTY-FOUR(24)

The defendant is sentenced as provided in pages 2 through 5 of the Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1988.

-The defendant is advised of his/her right to appeal within ten (10) days.
-The defendant has been found not guilty on counts 6, 12, 13, and 25 through 29 and is discharged as to such counts.
-Open counts are dismissed on the motion of the United States.
-The mandatory special assessment.is included in the portion of Judgment that imposes a fine.
-It is ordered that the defendant shall pay to the United States especial assessment of $ 2,000.00 which shall be due immediately.

App.1278

It is further ORDERED that the defendant shall notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid.

53546-053
Defendant's USM #

October 15. 1999.
Date of Imposition of sentence

05-04-62
Date of Birth

110 68-2560
Defendant's Soc. Sec. Number

s/Edward R. Korman,
EDWARD R. KORMAN, U.S.D.J.

In Custody.
Defendant's mailing address

Date of signature
A TRUE COPY ATTEST
DEPUTY CLERK

2572 National Drive
Brooklyn. New York 11234
Defendant's Residence Address:

App -1279

DEFENDANT: GURMEET SINGH DHINSA
JUDGMENT
CASE NUMBER: CR-97-0672(S-7)-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life Imprisonment on counts 1, 2, 4, 5, 8, 9, 23 & 24. Defendant shall serve a term of imprisonment for a period of One Hundr ed Twenty (120) months on counts 3, 7, 14 & 15 which shall run concurr ently with sentence imposed on counts 1, 2, 4, 5, 8, 9, 23, 24 and shall_run consecutively with each other. Defendant shall serve a term of imprisonment for a period Sixty(60) months on counts 11 and

16 through 22 which shall run concurrently with sentence imposed on counts 1 through 5, 8, 9, 14, 15,23, 24 and shall run consecutively with each other. Defendant shall serve a term of imprisonment for a period of Sixty(60) months on count 10, which shall run consecutively with sentence imposed on all other counts.

_____The Court recommends that the defendant be designated

_____The defendant asks to be housed in a facility The court notes this so that the Bureau of Prisons can accommodate his/her request if space permits.

X_____The defendant is remanded to the custody of the United States Marshal

_____The defendant shall surrender to the United States Marshal forthis District.

_____The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_____-12:00 noon:

_____As notified by the United States Marshal.

_____As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____with a certified copy of this Judgment.

United States Marshal

By:

App128O

DEFENDANT: GURMEET SINGH DHINSA JUDGMENT
CASE NUMBER: CR-97-0672(S-7)-01

SUPERVISED RELEASE

Upon release from Imprisonment, the defendant shall be on supervised release for a term of: Three(3) years on counts 3, 7, 14 & 15 which shall run concurrently with each other. Defendant shall serve a term of Supervised Release for a period of Three(3) years on counts 11 and 16 through 22 which shall run concurrently with each other and with the time of Supervised Release on counts 3, 7, 14 & 15. Defendant shall serve a term of Supervised Release for a period of Three(3) years on count 10, which shall run concurrently with the term of Supervised Release imposed on all other counts.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another Federal, State, or Local crime and shall comply with the standard condition that have been adopted by this Court (Seaforth on the following page).

The defendant is prohibited from possessing a firearm.

The defendant shall not illegally possess a controlled substance.

If this Judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any tines that remain unpaid at the commencement of the term of
supervised release.

- SPECIAL CONDITIONS:

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer as directed by the court or probatibn officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons:

6) The defendant shall notify the probaon officer within 10 days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a Physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity; and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendatit shall notify theprobation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requIrement.

DEFENDANT: GURMEET SINGH DHINSA
CASE NUMBER: CR-97-0672(S-7)-01

JUDGMENT

CRIMINAL MONETARY PENALTIES

X DEFENDANT SHALL PAY A SPECIAL ASSESSMENT IN THE AMOUNT OF ONE HUNDRED DOLLARS(S100.OO) ON EACH OF COUNTS 1 THROUGH 5, 7 THROUGH 11, AND 14 THROUGH 22 AND THE DEFENDANT SHALL PAY A SPECLAI ASSESSMENT IN THE AJOUNT OF FfFTY DOLLARS ($50.00) ON EACH OF COUNTS 23 AND 24 FOR A TOTAL ASSESSMENT IN THE AMOUNT **OF** TWO THOUSAND DOLLARS($2,000.OO).

X. DEFENDANT SHALL PAY A FINE IN THE AMOUNT OF FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) TO BE PAID IN ACCORDANCE WITH THE TERMS SET OUT IN PARAGRAPH TWO OF THE CONSENT ORDER ATTACHED HERETO.

X. DEFENDANT SHALL MAKE RESTITUTION IN ACCORDANCE WITH THE TERMS SET OUT IN PARAGRAPH ONE OF THE CONSENT ORDER ATTACHED HERETO.

DEFENDANT: GURMEET SINGH DHINSA
CASE NUMBER: CR-97-0672(S-7)-01

JUDGMENT

STATEMENT 0F REASONS

X. The Court adopts the factual findings and guideline application in the pre-sentence report.

The Court makes the foil dwin findings regarding the guidelines calculation:

GUIDELINE RANGE DETERMINATION BY THE COURT

Total Offense Level: 51

Criminal History Category: V

Imprispnment Range: Life Imprisonment. In addition, count 10 requires a consecutive 60 month custody sentence.

Supervised Release Range: Cbunts 1, 2, 4, 8, 23 and 24 3 to 5 YEARS Counts 3, 7, 10, 11 and 14 through 22 2 to 3 YEARS

Fine Range: $25.000.00 TO $250,000.00

DEPARTURES FROM THE GUIDELINES RANGE

_____ The sentence is within the guideline range, that range DOES NOT EXCEED 24 months, and the court finds no-reason to depart from the sentence called for by the application of the guidelines.

0R

X The prison sentence is within the guideline range, that range EXCEEDS 24 months.

_____ Upon motion of the government, as a result of defendant's substantial assistance.

X For the following specifle reason(s): The fine exceeds the guideline range pursuant to a stipuation of the parties.

January 15, 1999

Chris Reese

Margie Jackson

Chris: But listen - let me ask y'all a question.

Margie: What's up?

Chris: What's been going on with you?

Margie: Nothing much - I been working.

Chris: You alright?

Margie: Chillin' - hell yeah!

Chris: I mean you ain't –

Margie: I'm doing great baby –

Chris: Let me ask you a question though wait –

Margie: I ain't no crack (UI) doing no crazy shit –

Chris; No no no no no not like that. Not like that. But I'm saying you ain't in no trouble or nothing?

Margie: No I'm not in no trouble.

Chris: You know why- cause you- I heard your name recently. Or I read your - I read your name and I heard it.

Margie: Read it?

Chris: Read it and heard it recently. And it and-and unless they talk

Margie: You read it?

Chris: Unless they talking about somebody else

Margie: In a letter?

Chris: Huh?

Margie: You read it in newspaper?

Chris: No I read it in- No it hasn't been in the newspaper yet. It might end up in the newspaper. But it hasn't ended up in the newspaper yet. You know a dude named Mary?

Margie: Yeah.

Chris: So you know what I'm talking about?

Margie: Yeah I know what you're talking about. But I ain't in no trouble.

Chris: Oh no- that's what I'm saying but...

Margie: Oh, OK.

Chris: Um- 1-I-I heard it and I'm like- wait a minute- that's my people.

Margie: Yeah yeah yeah.

Chris: And-and I know 'em.

Margie: Mmm-hmm.

Chris: I been talking to him.

Margie: Ok. You do? You haven't spoke to him?

Chris: I speak- I was speaking to him up until- a few weeks ago - everyday.

Margie: What?

Chris: Ev- when's the last time you spoke to him?

Margie: Since since last year- the year before last actually.

Chris: You haven't spoke to him since he been in?

Margie: No.

Chris: At all?

Margie: I can't.

Chris: What?

Margie: I can't and my number changed and all'a that stuff- you know?

Chris: Oh they did all that?

Margie: Yeah- no I changed my own number.

Chris: Oh-

Margie: That's what happened...

Chris: Beause you know what - you know - I don't know - see. If I understood it correctly you supposed to be - they supposed to be calling on you.

Margie: They already (UI) to the DA's and all that stuff.

Chris: No - I mean they supposed to be call - cause you know the trial is going on.

Margie: Yeah it's going on right now –

Chris: Yeah.

Margie: I know all of that.

Chris: Right.

Margie: I gotta go to the DA's Saturday and do um - you know how they prepare you for questioning and stuff like that.

Chris: They going to prepare you to- for questioning?

Margie: Yeah.

Chris: Mmm. Cause-cause I was reading this thing and I was like - what the fuck- how this come about?

Margie: Yeah yeah- it-it's some shit. I was at the wrong place at the wrong time babe.

Chris: Yeah- but you know what-you know he-you know from what I understand-

Margie: Right.

Chris: From what, from what I heard from yesterday.

Margie: Uh-huh.

Chris: That he said he paid you.

Margie: No he didn't.

Chris: This is what I heard.

Margie: No he didn't. No he did not. No he did not

Chris; From what I heard he said he paid you seven hundred dollars.

Margie: No he didn't give me no seven hundred dollars.

Chris: That's my word-this is what I heard.

Margie: That's what Marvin told you?

Chris: This is what I heard.

Margie: That's bullshit - well you heard wrong.

***

Chris: But he said- he I swear he said he gave you seven hundred dollars.

Margie: Yeah.

Chris: He said he gave you seven hundred dollars afterwards.

Margie: Yup.

Chris: He said he gave you seven hundred dollars afterwards- I think be said that yesterday.

Maigie: [laughing]

Chris: Mmm-hmm.

Memo

To: GLS

From: JL

Subject: Singh: Surinder Parmar/Kuldip Singh

Date: August 7, 1997

Pannar

Les Levine and I met with Parmar at his attorney Joe Mure's office on July 25, 1997. Parmar recounted the events surrounding his abduction, from July 2 through July 5, by officers from the 115th Precinct in Queens.

On Saturday, July 2, at about 7 am, detectives from the 115th Precinct stopped by Parmar's bakery and told him they needed to talk to him. Parmar was put in a car and brought to the 115 and locked up. Five detectives began a steady stream of questioning and yelling about Singh. Parmar was accused of being involved in a murder conspiracy with Singh. The intended victim was Balwant Singh, the owner of BK Construction in Queens Village and the apparent unnamed subject of Count 4 of the indictment.

Balwant ran into Parmar inside the temple in Queens, and, according to Parmar, the police believe that at the temple Paimar inforined Balwant of the plot to kill him. Balwant's murder would have been payback for the 10th Avenue murder which Balwant supposedly ordered.

During the four day period, Parmar was not allowed to call a lawyer despite his repeated requests. He was denied food and

water. He begged to be released and complained that his business was suffering. He was also told by the detectives, repeatedly, that if he did not cooperate with them Singh would kill him. In addition to the abuse, an Indian detective named Rocco threatened to beat him. Parmar denied being involved in any plot with Singh or having knowledge about any of Singh's illegal ativities. He also refused to cooperate with the detectives.

Finally, on Sunday evening, he was taken to a Flushing precinct. He was never entered into the log in any precinct. He was later brought back to the Northm Blvd precinct He was moved around a lot so that he would not be found by Singh's lawyers (a la Marvin).

GLS
Page 2
August 7, 1997

Finally, he ended up in Central booking (on Monday). Marvin, for a short time, shared a cell with him. Marvin didn't know him. During Marvin's time in the cell, he called his mother and others-stating that "The game is over; I can't do nothing. I did my job."

The charges were dropped against him on Monday. FBI agent Glynn took Parmar and Marvin and Marvin's cousin (?) Robin or Reuben to 26 Federal Plaza on Tuesday. Pictures and prints were taken. Glynn asked about "Gulzar" Singh (who, apparently, is acutally Vipin) Parmar was released Tuesday at 4 pm and given $40 by Glynn.

Two days later, the detectives came again to his house (7 pm) and took him to the 105th Precinct. He was kept for two hours and asked about Lucky. He was also asked about the video from the party (the detectives had the video). He was shown pictures of Marvin. He told them that he had seen

Marvin in jail; the detectives asked what Marvin had said. He was also shown a picture of Balwant. He was threatened with indictment unless he cooperated.

The next morning, the detectives came to the bakery. Parmar was not around. Detective Frank Bovino left his card (he conducted the search of 276 North Henry Street re guns).

Leslie Caldwell called Mure a few days later and asked if Parmar wanted to cooperate. - She claimed that he had indicated to the detectives that he did. She also informed Mure that Parmar was in danger and that he was not a suspect at this point in any crimes.

Parmar informed me that he knew nothing about the murder of the Livery car driver in Queens and never saw the October of 1991 shooting or fight that precipitated it.

Kuldip Singh

I met with Kuldip Singh on two occasions (July31 and August 2) regarding his treatment by detectives from the 115th Precinct. Kuldip works at the station on 2800 Bruckner Blvd. On July 29, detectives from the 115 visited the station looking for him; however, he had previously gone home due to illness. The detectives left a card (Det. Verma, also known as "Rocky") with John who works at the attached convenience store and a number for Kuldip to call.

Kuldip called the next day. Verma stated that he wanted to stop by for questioning and Kuldip said he worked from 6 am until 6 pm. Verma came by and parked across the street. He told Kuldip to just walk across the street into Verma's car so that no one would notice what he was doing.

GLS

August 7, 1997

Kuldip was taken to the 115th Precinct at 5 pm for *5* hours. He was questioned by 15 detectives over the 5 hour period. Despite repeatedly asking to call his attorney (he showed my name and nunber), Verma refused, claiming that Kuldip didn't need a lawyer. Kuldip was asked about Singh, his brother, Vipin, Babu and Brother #1. Kuldip claimed that he did not know what happened to Brother #1(Kulwant Singh). Kuldip was also asked how his pumps short customers. Kuldip denied this. Verma told him, screaming at times, "Singh has tried to kill you!!!" Verma offered to put Kuldip and his family in the Wilness Protection Program. After five hours, Kuldip was brought home when he reffised to cooperate. The detectives promised to come back again to visit him

**MB: Magda spoke with Verma at approximately 5pm on July 30; apparently the time Kuldip had been brought back to the 115. Venna denied knowing Kuldip and claimed that he had been in court testifring all day.

AFFIDAVIT OF WALTER JOHNSON

STATE OF KANSAS)
) ss:
COUNTY OF LEAVENWORTH)

WALTER JOHNSON. being duly sworn, deposes arid says:

1. I have known Marvin Dodson for a number of years. Last fall he and I were incarcerated together in Unit 3 South of the Metropolitan Detention Center.

2. When I asked Dodson the reason he was incarcerated he told me that "they got me for some serious shit. I was at a gas station and two guys were in a van. They were supposed to do it [a murder] but I had to come from behind ad do it myself."

3. We had learned that an inmate named "Singh" was.also inthe Metroplitan Detention Certer. Initially, Dodson told myselt and Other inmates that he planned on killing "Singh" because Singh was "ratting" on him.

4. Dodson told me that he met Singh after he showed up at Singh's construction site with a bunch of men. Dodson said to me that he told the person in charge that either his crew better be put on the job, or, Singh could just pay him and he would take care of everyone. If the money wasn't paid, Dodson claimed there would be a lot of trouble for Singh at the construction sites.

5. Dodson told me that before getting arrested, he was trying to find out where Singh kept his money and then he would rob and kill Singh. Dodson claimed that he followed Singh home a couple of times. In

addition, be claimed that he wanted to learn the gasoline business and get close to Singh so that after he killed him he could take over Singh's business. He said he was "playing Singh real close."

6. Dodson asked if I would be willing to do some "work" for him on Singh-"work" meaning to murder him. He also asked me to get a keife for him to itse to stab Singh

7. Once, we were on the deck of Unit 3 South. Singh was on the deck of Unit 4 South at the time, which was visible to us Dodson began screaming at Singh and -threatened him. Dodson also called him a rat. Finally Singh just looked at him and said "Marvin, why did you do this to me?" Dodson just kept on screaming trying to cause confusion so that no one would listen to Singh. At 'this point, I realized that the reason Dodson was doing this was beause he had lied about Singh being a "rat" and did not want us to hear Singh's comments

8. I confronted Dodson about this and he admitted that he was the one who was "ratting" on Singh. He told me that after be was arrested, he was interrogated for a long time by detectives. Once Singh's name came up, the detectives just wanted to talk about Singh. Dodson told me that the detectives told him that if he cooperated .against Singh it would be like "Gotti and Sammy the Bull," meaning that he would not spend much time in prison. Dodson bragged to me that he thought he'd get out of jail "in a minute."

9. Even after Dodson adimitted that he was "ratting on Singh," he still asked me for help in killing Singh. I told him that I would not help.

10. Dodson never claimed that Singh was involved in the crime for which Dodson was charged. I asked Dodson why he was cooperating against Singh and be told me that be had to blame Singh because he didnt want to spend the rest of his life in prison. He said Singh would "walk" in this case because he had a lot of money. Dodson said that Singh had "so much money, even if he goes to trial he'll win." Dodson claimed that he had no money so he had to tell the "Feds" a story that they wanted to hear.

11. The "Feds" wanted Singh bad, according to Dodson. They told Dodson that Singh "had gotten away with a lot in the past." In addition, they told Dodson that they wanted Singh's money.

12. Dodson told me that he hoped that "these mother fuckers"—meaning the Feds— "don't arrest my girl" He didn't say if she was involved in his crimes.

s/Walter Johnson
WALTER JOHNSON

Sworn to before me the
21st day of December 1998

s/signature

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERKS
OFFICE U.S.

GURMEET SINGH DHINSA,
Petitioner

ORDER TO SHOW CAUSE

- against -

AL HERRERA
Respondent.

CV-02-6156 (ERK)

KORMAN, J.

Upon the petition made pursuant to 28 U.S.C. 2255, dated 11/18/02., a copy of which is annexed, it is hereby ORDERED that:

(1) petitioner is granted leave to proceed in forma pauperis;

(2) the United States Attorney for the Eastern District of New York as attorney for the respondent, show cause before this Court by the filing of a return to the petition, why said motion pursuant to 28 U.S.C 2255 should not be granted;

(3) within sixty (60) days of receipt of this order, the United States attorney for the Eastern District of New York shall serve a copy of his return upon the petitioner herein and file the original thereof, with proof of such service, with the Clerk Of this Court;

(4) Petitioner, within sixty (60) days of receipt of a copy of the return of the United States Attorney, shall file a reply, if any, with the Clerk of this Court;

(5) service of a copy of this Order to Show Cause shall be made by the Clerk of this Court by forwarding a copy thereof together with a copy of the petition, to the United States Attoriey for the E.D.N.Y., attention of **BENTON CAMPBEIL, AUSA** and by mailing a copy of this order to the petitioner.

s/Edward R. Korman
EDWARD R KORMN,
U. S. D. J.

DATED: Brooklyn, New York
January 7, 2003

U.S. Department of Justice
United States Attroney
Eastern District of New York

U.S.One PierrepontPlaza
Brooklyn, New York 11201

Mailing Address: 147 Pierrepont Street
Brooklyn, New york 11201

March 7, 2003

FILED
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U.S. DISTRICT COURT E.D.N.Y.
MAR 07 2003

Hon. Edward R. Korman
United *States* District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERIC)

Dear Chief Judge Korman:

The government submits this letter to request an extension of the date for filing a response to the 2255 petition of Gurmeet Singh Dhinsa from March 10, 2003 to April 14, 2003. This government makes this request because it has proven
necessary to order portions of the trial transcript directly from

the transcription service and review a number of documents and records associated with the petitioner's lengthy criminal trial which are in storage.

We have consulted counsel for the petitioner, Barry Kozyra, Esq., and he has advised that he does not oppose the government's request.

Respectfully submitted,
ROSIJYNN R. MUSKOPF
ED STATES ATTORNEY
By: _s/signature
Benton J. Campbell
Ronald G. White
Catherine Friesen
Asst. U.S. Attorneys

cc: Barry A. Kozyra, Esq.
(Via fax 973-403-9652)

FILED
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APR 14 2003

U.S. Department of Justice
United States Attorney
Eastern District of New York
One Pierrepont Plaza
Brooklyn, New York 11201
Mailing Address: 147 Pierrepont Street
Brooklyn, New York 11201

April 10, 2003

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

The government submits this letter to request an extension of the date for filing a response to the 2255 petition of Gurmeet Singh Dhinsa from April 14, 2003 to May 19, 2003. This government makes this request because it has proven necessary to order portions of the trial transcript directly from the transcription service and review a number of documents and records associated with the petitioner's lengthy criminal trial which are in storage. According to the court reporter, it has taken an unusually long time to obtain the transcript because the contents of the court's file had to be catalogued prior to its retrieval, a process that remains ongoing.

We have consulted counsel for the petitioner, Barry Kozyra, Esq., and he has advised that he does not oppose the government' s request.

Respectfully submitted,
ROSTYNN R. MTUSKOPF
UNITED STATES ATTORNEY

By:s/Catherine Friesen
Benton J. Campbell
Ronald G. White
Catherine Friesen
Asst. U.S. Attorneys

cc: Barry A Kozyra, Esq.
(Via fax 973-403-9652)

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RAJ GADHOK1(1)
LYNNE M. GIACHETTI
(1)MEMBER OF NJ & NY BARS

May 16, 2003

Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

I am in receipt of a letter dated May 15, 2003, submitted by Assistant United States Attorney Catherine Friesen on behalf of the Government seeking to extend the date for filing a response to the Section *2255* petition on behalf of Gurmeet Singh Dhinsa from May 19, 2003 to July 21, 2003.

As noted in the Government's request,I did not oppose the request and extension of time to file responsive papers. However, this is the third time that the Government has requested for an extension of time to file opposition to the Section 2255 petition while Mr. Dhinsa remains in prison

in Lompoc, California. I advised Assistant United States Attorney Friesen that I would oppose any further extension of time to file a responsive position by the Government by reason of its inability to obtain documents. I would repspectfully request that the Court indicate that there will be no further adjournments granted by reason of the Government's inability to obtain trial transcripts or other documents.

Respectfully submitted,
s/Barry A. Kozyra, Esq.
BARRY A. KOZYRA, ESQ.

BAK:phw
cc: Catherine Friesen, Asst. U.S. Attorney

U.S. Department of Justice

FILED
IN CLERKS OFFICE
U.S. DISTRICT JRT E.D.NY
JUL 08 2003

United States Attorney
Eastern District of New York

One Pierrepont Plaza
Brooklyn, New York 11201
Mailing Address: 147 Pierrepont Street
Brooklyn, New York 11201

May 15, 2003

Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singli Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

The government submits this letter to request an extension of the date for filing a response to the 2255 petition of Gurmeet Singh Dhinsa from May 19, 2003 to July 21, 2003. This government makes this request because it has proven necessary to order portions of the trial transcript directly from the transcription service and review a number of documents and records associated with the petitioner's lengthy criminal trial which are in storage. According to the court reporter, it has taken an unusually long time to obtain the transcript because the contents of the court's file had to be catalogued prior to its retrieval, a process that remains

ongoing. We are hopeful that this will be the government's final request for an adjournment.

We have consulted counsel for the petitioner, Barry Kozyra, Esq, and he has advised that he does not oppose the government's request.

Respectfully submitted,

ROSIYNN R. MAUSKOPF
UNITED STATES ATTORNEY
By: S/Catherine Friesen
Benton J. Campbell
Ronald G. White
Catherine Friesen
Asst. U.S. Attorneys

cc: Barry A. Kozyra, Esq.
(Via fax 973-403-9652)

U.S. Department of Justice

FILED
IN CLERKS OFFICE
U.S. DISTRICT JRT E.D.NY
JUL 16 2003

United States Attorney
Eastern District of New York

One Pierrepont Plaza
Brooklyn, New York 11201
Mailing Address: 147 Pierrepont Street
Brooklyn, New York 11201

July 15, 2003

Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

The government submits this letter to request an extension of the date for filing a response to the 2255 petition of Gurmeet Singh Dhinsa from July 21, 2003 to September 21, 2003. This government makes this request because we have not yet received the transcript of the charging conference held February 18-19, 1999, during which we believe the defendant's right to testify was addressed. There have been numerous delays in the preparation of the transcript, which we first requested in February, apparently due to the transmission of the court folder to closed files. AUSA Friesen left a message last week with counsel for petitioner, Barry Kozyra, Esq., advising him that we intended

to request another adjournment and asking whether he had a copy of the transcript at issue. We have not yet heard back from him.

Respectfully submitted,
ROSLYNN R. MAUSKOPF
UNITED STATES ATTORNEY
By: s/Catherine Friesen
Benton J. Campbell
Ronald G. White
Catherine Friesen
Asst. U.S. Attorneys

cc: Barry A. Kozyra, Esq.
(Via fax 973—403—9652)

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RAJ GADHOK1(1)
LYNNE M. GIACHETTI
(1)MEMBER OF NJ & NY BARS

August 5, 2003

Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

This office represents Gurmeet Singh Dhinsa with respect to a petition for relief from his conviction and sentence pursuant to 28 U.S.C. §2255. On July 15, 2003, Your Honor entered an Order extending the Government's time to file its brief and responding papers in the above-captioned matter to September21, 2003. This is the Government's fourth request for an extension of time to file its papers. The Government's proffered reason for this extension *is* its need to obtain transcripts of a charging conference held before the Court. It is my understanding

from Assistant United States Attorney Catherine Friesen that the Government contends that one of the issues addressed by the petition, to wit, that Mr. Dhinsa was not advised that it was his constitutional right to testify at his trial, was specifically addressed during the charging conference. It is presumably the Government's position those rights vere knowingly waived by- Mr. Dhinsa.

KOZYRA & HARTZ, LLC

On May 16, 2003, I wrote to Your Honor on behalf of Mr. Dhinsa objecting to any further delays inthe Government's filing of its response. I renew that objection and ask that the Court grant no further extensions to the Government to file a response based on an alleged lack of documents. I ask the Court to draw an adverse inference to the Government's failures to promptly respond and the Government's continued failure to demonstrate that Mr. Dhinsa was aware of his right to testify at the above trial and waived that right knowingly. Mr. Dhinsa remains incarcerated in the federal prison at Lompoc, California and should not be compelled to continue confinement while the Government seeks further extensions of time and delay in responding to the application. At some point- and we submit it is now, or not later than September 21, 2003 -. Mr. Dhinsa's right to due process of law is violated and redress is appiopriate.

By copy of this letter, I am notifying Assistant United States Attorney Catherine Friesen of our position with respect to any further adjournments based on the Government's inability to find transcripts supporting its position that Mr.

Dhinsa was made aware of his right to testify at this trial and knowingly waived same.

Respectfully submitted,
s/Barry A. Kozyra
BARRY A. KOZYRA

BAK:cml

cc: Catherine Friesen, Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA•

02-CV-6156 (ERK)

- against - 97-CR-672 (ERK)

GURMEET SINGH DHINSA,
Defendant-Petitioner.

---------- X

UNITED STATES' MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION PURSUANT TO 28 USC. §2255

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York
147 Pienepont Sfreet
Brooklyn, New York. 11201

Ronald White
Catherine Frieen
Assistant United States Attorneys
(Of Counsel)

INTRODUCTION

Defendant-Petitioner Gurmeet Singh Dhinsa has filed a post-conviction motion, pursuant to Title 28, United States Code, Section 2255, challenging his 1999 conviction after trial of racketeering and numerous related offenses including murder, murder conspiracy, kidnapping, mail fraud and firearms violations. Specifically, Dhinsa was convicted of: racketeering and racketeering conspiracy (Counts 1 and 2); three counts of murder conspiracy (Counts 3, 7 and 14), two counts of racketeering murder (Counts 4 and 8), two counts of obstruction of justice murder (Counts 5 and 9), one count of using and carrying a firearm during a crime of violence (Count 10), one count of threatening to commit murder (Count 11), one count of being a felon in possession of firearms (Count *15),* one count of mail fraud conspiracy (Count 16), seven counts of mail fraud (Counts 17 through 22), one count of kidnapping conspiracy (Count 23), and one count of kidnapping (Count 24). Dhinsa was acquitted on eight counts (Counts 6, 12, 13, and 25 through 29). Dhinsa was sentenced on October 15, 1999 to multiple life sentences for the racketeering, murder and kidnapping charges.[1] He his currently incarcerated.

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[1] 1 Dhinsa was sentenced to terms of life imprisonment on Counts 1, 2, 4, 5, 8, 9, 23 and 24. In addition, he received sentences of 120 months on counts 3, 7, 14 and 15, to be served concurrently with the life terms and consecutive to one another. Dhinsa was also sentenced to sixty months for his convictions on Counts 11 and 16 through 22, also concurrent with the life terms and consecutive to one another. Finally, Dhinsa received a mandatory consecutive term of sixty months for his conviction under 18 U.S.C. § 924(c).

The convictions were affirmed on appeal, except for count 11 (threat to murder) and counts 23 and 24 (interstate kidnapping). United States v. Dhinsa, 243 F.3d 645 (2d Cir. 2 2001). Those counts were vacated and remanded and later dismissed after the government elected not to retry Dhinsa.

In his Section *2255* petition, the defendant argues that Gerald Shargel, Esq., Dhinsa's highly experienced and able trial counsel, forced Dhinsa not to take the stand at trial, thereby depriving him of his right to testify, and prevented him from calling witnesses in his own defense. As set forth more fully below, these claims are without merit and should be summarily dismissed. Alternatively, as discussed more fully below, if the Court wishes to expand the record on the "performance" prong of the ineffectiveness claim, it is requested that a limited hearing be held for the sole purpose of taking testimony on that issue.[1]

[1] As discussed below, Mr. Shargel has declined the government's request that he submit an affidavit to the court.

STATEMENT OF FACTS

A. Introduction

Dhinsa was convicted of numerous offenses contained in a multi-count racketeering indictment which charged him with controlling a racketeering organization known as the "Singh Enterprise." The case was extraordinarily complex, in part because of the government's decision to seek the death penalty against Dhinsa for his involvement in the homicides charged in the indictment. The trial of the case, including jury selection and the penalty phase, spanned nearly four months. The government's case included nearly one hundred witnesses and hundreds of exhibits.

The overwhelming nature of the government's evidence was confirmed by the jury at the conclusion of the penalty phase of the case when it agreed unanimously, in rejecting a "mitigating factor" advanced by Dhinsa, that it had no lingering, or "residual," doubt about Dhinsa's guilt. The jury's assessment was shared by the trial court, which stated at the conclusion of the case that the evidence, particularly telephone and cell site records introduced at trial, made Dhinsa's guilt "a certainty."

Dhinsa's organization was built around a chain of 51 gasoline stations that he owned and operated throughout the New York City metropolitan area under the name "Citygas." Dhinsa generated miffions of dollars in fraudulent income for himself and other members of the Singh Enterprise by rigging gasoline pumps at his stations to overcharge Citygas customers, a practice commonly known as "short-measuring." The indictment also charged with Dhinsa the murder of two men, Manmohan

Singh and Satinderjit Singh,[1] in order to protect this lucrative operation. At the time of his death in March 1997, Mamnohan was attempting to confront members of the Singh Enterprise about their role in the disappearance of his brother Kulwant Singh from a Citygas station in the Brorix in.July 1995. Satinderjit was actively cooperating with a New York City Police Department ("NYPD") investigation of Dhinsa and his organization.

Dhinsa was arrested on July 7, 1997, two weeks after the murder of Satinderjit. At the time of the arrest, officers uncovered evidence that Dhinsa was plotting to kill another witness who was helping law enforcement efforts prosecute members of the Singh Enterprise. Dhinsa was initially indicted on July 19, 1997. Shortly thereafter, the first of a series of superseding indictments was returned by a grand jury in the Eastern District of New York charging Dhinsa and other members of his criminal organization with various crimes including racketeering, murder, fraud, and kidnapping.

B. Summary of the Government's Case

Dhinsa's trial began with jury selection on November 29, 1998. Opening statements were given on January 4, 1999.

The government's case included testimony from several cooperating defendants. One of those accomplice

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[1] Many of the men and women involved in the case were members of the Sikh religion, in which nearly all males adopt the last name "Singh." For clarity, petitioner will be referred to throughout the government's memorandum as Dhinsa.

BEST AVAILABLE COPY

witnesses was Singh Enterprise hit man Marvin Dodson who testified about his role in the murders of Satinderjit Singh and Manmohan Singh. Dodson carried out both killings at Dhinsa's order. Dhinsa's motive in committing the murders was to prevent the victims from cooperating with an investigation of the Singh Enterprise and its members. Dodson's friend Evans Alonzo Powell also testified about his participation as the driver in both homicides and his involvement in a separate unsuccessful plot to kill Sarvjeet Singh, a witness in a New York State homicide case pending in 1997 against Dhinsa's brother Gogi Singh. The government also called a third accomplice witness, Walter ("Jazz") Samuels, who described his participation in the June 1997 murder of Satinderjit Singh, the plot to kill Sarvjeet Singh, and a third plot he participated in with Dodson and Dhinsa to kidnap Sarvjeet Singh's friend Balwant Singh.

The government also called several other witnesses, including a large number of former Citygas employees. These witnesses, including former office employee Satinderpal Minhas, testified in detail about the operation of the pump-rigging system, describing how Citygas gasoline pumps were electronically rigged to short change customers. The government also called former New York City Department of Consumer Affairs ("DCA") inspector Lawrence Woods, who testified about how, in exchange for regular bribery payments from Dhinsa, he tipped off the Singh Enterprise about DCA inspections targeting Citygas stations and provided Dhinsa with special DCA seals and stickers and information about DCA enforcement operations.

In addition, the government called dozens of victims of the Singh Enterprises's criminal activities, including Sarvjeet Singh, targeted for death by Dhinsa shortly before his arrest in July 1997, Sarvjeet Singh's friend

Balwant Singh, victims of the Singh Enterprise's short-measuring activities, and Muchtir Ghuman, a restaurant owner kidnapped and threatened with death by Dhinsa and other members of the Singh Enterprise in November 1995. Several FBI agents and NYPD officers also testified about evidence discovered during the investigation. The government also called dozens of custodial witnesses to describe documents and important records obtained during the investigation. Hundreds of physical exhibits were introduced including firearms seized from Dhinsa's Citygas headquarters at 276 North Henry street, documents found in Dhinsa's car on the Iay of his arrest, tapes and transcripts of prison telephone calls made by Dhinsa, license plates, receipts, and telephone records.

Among the most important documents introduced at trial were cell site records for Dhinsa's car telephone. Those records showed where Dhinsa was located when he placed or received calls on his car phone on June 18, 1997, the day of the murder of Satinderjit Singh. The records demonstrated, among other things, that Dhinsa was at the scene of the murder of Satinderjit Singh and that, later that afternoon, he met with his hit team in East New York.

C. Summary of the Defense Case

Throughout the trial, Mr. Shargel vigorously cross-examined the government's witnesses, confronting them with, among other things, tape recordings, documents and other evidence gathered by defense investigators. Marvin Dodson, in particular, was savagely impeached with evidence of his prior inconsistent, false and outright perjurious statements to various law enforcement officials and judges (T. 1312-1388, 1502-1509); his expectation of receiving a lenient sentence because of his testimony

against Dhinsa (T. 1397-1401, 1417-18); and his preparation of an affidavit claiming that he was entitled to receive a 25 million dollar award, again because he testified against Dhinsa (T. 1401-1414). The defense also introduced numerous recorded conversations between Dodson and defense-spy Christopher Reese as evidence of Dodson's "bias, hostility and motive." (T. 1421) In those tapes, Dodson discusses, among other things, his belief that he will be released from jail imminently, his system for communicating outside the prison, and his desire to receive a cash reward for his testimony. In one tape, Dodson makes what the defense characterized as veiled death threats against a defense investigator. The other cooperating and civilian witnesses were similarly impeached, with varying degrees of success, with evidefice of their biases, hostility, prior inconsistent and false statements, and motives to fabricate testimony against Dhinsa.

Dhinsa, though Mr. Shargel, also called witnesses in his own defense. Kawalajit Chandi testified, among other things, that Ghuman, the victim of the kidnapping, did not invest money in his own business and was not threatened or coerced into giving up his share in the business. (Tr. 5619).

D. The Verdict & Appeal

The jury returned its verdict in the guilt phase of the trial on March 2, 1999 convicting Dhinsa of, among other things, the murders of Satinderjit and Manmohan Singh. The trial then moved on to the penalty phase proceeding, which took place on March 9, 1999. The jury returned its penalty phase verdict on March 10, rejecting the death penalty and recommending life imprisonment.

On appeal, Dhinsa contended that the district court erred by admitting hearsay statements made by the victims of Dhinsa' s crimes. He also claimed that: there was insufficient evidence to convict him under 18 U.S.C. § 1959; the court erred by admitting testimony of the girlfriend of one of the murder victims about a telephone threat she received before the victim's death; the indictment was improperly amended; the evidence was insufficient to convict him of kidnapping; a new trial was warranted on the RICO counts because a number of RICO predicates are invalid; there was insufficient evidence to convict Dhinsa of coercion; the evidence was insufficient to support Dhinsa's conviction of weapons possession; and that it was error to admit evidence seized from Dhinsa's automobile on the day of his arrest.

The Second Circuit rejected most of Dhinsa' s. claims, but vacated his conviction on the kidnapping and threat to murder charges and remanded them for a new trial. United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001). The Supreme Court denied Dhinsa's petition for a writ of certiorari on October 1, 2001. The government elected not to retry Dhinsa on the open counts, which were subsequently dismissed with prejudice.

E. Additional Facts Relevant to This Section 2255 Petition

In September of 2002, Dhinsa filed a petition for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Central District of California, challenging the instant conviction. On September 23, 2002, the court dismissed that petition without prejudice for lack of jurisdiction and directed Dhinsa to re-file in the sentencing court. Dhinsa then filed the instant petition in the Eastern District of New York.

Dhinsa claims ineffective assistance of counsel based upon the alleged deprivation by his counsel of Dhinsa's right to take the stand. Specifically, Dhinsa claims that he repeatedly told his counsel, Gerald Shargel, that he wished to testify and that he was told "hold on" or "lets see how it goes." Dhinsa Aff.¶ 9. Dhinsa states that, the night before the trial ended, he repeated his wish to testify and was told "we'll see tomorrow." Id. ¶12. At that time, Dhinsa claimed to be unaware that the decision to testify was his own. According to Dhinsa, "the next morning, I was told 'we don't want you to testify," and he felt "he had no choice but to accept" that decision. Id. ¶ 14. Dhinsa states that, if called to testify on his own behalf, he would have told the jury that he did not know the murder victims, or Balwant Singh or Sarvjeet Singh and that the case against him "was the product of government witnesses who had lied and exaggerated their testimony." Id. ¶ 21.

Dhinsa further claims that defense counsel was ineffective by refusing to call witnesses on his behalf who would ha corroborated his testimony. Dhinsa Aff. Id. ¶ 15, 18. Specifically, Dhinsa identifies Walter Johnson, who purportedly would have testified about his conversations with cooperating witness Marvin Dodson, and Surander Parmer, who would have testitied that he never delivered threatening messages to Balwant Singh. Dhinsa attaches an affidavit from Walter Johnson, dated December 1998, in which Johnson claims that Dodson told him he identified Dhinsa because the federal agents "just wanted to talk about [him]" and that Dodson saw Dhinsa as his way out of prison. See Johnson Aff. Dhinsa also attaches a memorandum from "JL," (which may have been authored by Jeffrey Lichtman, one of his lawyers), regarding an interview with Surander Parmer, see Parmer Memo, exhibit F, and a transcript of a phone conversation between Margie Jackson and Christopher

Reese, Exhibit. In his counsel's affidavit, Dhinsa claims, based on the memorandum and the transcript, that both Parmar and Jackson would have testified favorably to him and that Mr. Shargel was remiss in not calling them to testify. SeeKozyra Aff. ¶ 19-20.

Mr. Shargel declined the government's request that he submit an affidavit to the Court detailing his discussions with Dhinsa regarding his right to testify.

ARGUMENT

PETITIONER' S CLAIM OF INEFFECTiVE ASSISTANCE OF COUNSEL IS MERITLESS

A. Petitioner's Claim That He Was Deprived of His Right to Testify Should Be Rejected Because He Cannot Demonstrate Prejudice

The right of a defendant to take the stand in his own defense is of constitutional dimension, and a defendant's establishment through particularized and credible evidence that his defense counsel unethically deprived him of this right, if prejudice resulted, may support a finding of ineffective assistance of counsel. Brown v. Artuz, 124 F.3d 73, 80 (2d. Cir. 1997). On a collateral attack such as the present one, however, in which a defendant seeks to upset a conviction affirmed on appeal, the burden of proving such a deprivation "lies with the petitioner." Whitaker v. Meachum, 123 F.3d 714, 714 (2d Cir. 1997); see Triana v. United States,205 F.3d 36, 40 (2d Cir. 2000).

Specifically, any claim by a defendant that he either was not informed of his right to testify, or that defense counsel overrode his decision to testify, "must satisfy the

two prong test established in Strickland v. Washinton, 466 U.S. 668 (1984)." Brown v. Artuz, 124 F.3d at 79. As the Second Circuit summarized:

> Under Strickland, a defendant must establish both that counsel's performance was so defective that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"and that counsel's errors were "so serious as to deprive the defendant of a fair trial. . . ." To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance,". . . and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, V the result of the proceeding would have been different."

Id.79-80.

Judged by these standardsDhinsa's claim should be rejected. Dhinsa has satisfied neither the "performance" nor the "prejudice" prong required by Strickland. First, with regard to the "performance" prong, to succeed on a claim that counsel denied a defendant his right to testify, the defendant must establish that counsel coerced that decision or otherwise denied him his right to testify through some deceit or an unprofessional misstatement of the law. See United States v. Aguirre, 912 F.2d *555*, 562-63 (2d Cir. 1990); Campos v. United States, 930 F. Supp. 787, 792-93 (E.D.N.Y. 1996). No ineffective assistance claim lies where defense counsel merely advises a client not to testify and the client takes that advice. Aguirre, 912 F.2d at 562-63; Campos, 930 F. Supp. at 792 n.6.

In this case, Dhinsa's sole "proof' of his trial counsel's alleged unethical behavior is his affidavit that he did not understand his right to testify and that his wish to testify was simply disregarded by defense counsel. This self-serving statement is barely sufficient to raise an issue under Strickland. As one Court aptly noted, "it is simple enough after being convicted for the defendant to say, 'My lawyer wouldn't let me testify.' Therefore I'm entitled to a new trial." Underwood v. Clark, 939 F.2d 473, 475 (7th Cir. 1991). The Second Circuit has directed that, when this type of generic claim is made, the trial court should conduct a limited hearing at which letters, documentary evidence or other affidavits can be received in order that the claim's veracity can be evaluated in light of the entire record. Chan v. United States, 250 F.3d 79, 86 (2d Cir. 2001)(rejecting defendant's "highly self-serving and improbable assertions" that defense counsel would not let him testify after reviewing defense counsel's affidavit). The court is not required to hold a testimonial hearing if the expanded record adequately demonstrates that the claim is baseless and is expressly permitted to use its own kntwledge of the case in evaluating the evidence. j (commenting that Judge Glasser "was intimately familiar with the trial proceedings and the events and circumstances surrounding them.")

Here, given Mr. Shargel's distinguished reputation, vigorous defense of Dhinsa[1] and lengthy history of

---

[1] With regard to Mr. Shargel's overall performance, Judge Korman remarked that "it was the best defense of a criminal case that I've seen in my whole time, not only on the bench but since I've started watching in 1970 ... It was just brilliant. Brilliant. I don't think anybody could have done more for him [Dhinsa] than you did." (Tr. *7035).*

representing him on other matters, it is highly unlikely, if not impossible, that Dhinsa's claims are true. It is far more likely that Dhinsa reasonably and knowingly took his counsel's advice not to testify — a sound decision in light of Mr. Shargel's success at impeaching the government's witnesses and knowledge of the wealth of material which the government had amassed for purposes of impeaching Dhinsa. Nonetheless, because Mr. Shargel refuses to provide an affidavit detailing his conversations with Dhinsa on the matter, the Court may find that a testimonial hearing is required to resolve the issue fully.

Nonetheless, even if the record is not sufficient on the "performance" prong to evaluate the credibility of defendant's claim, he has not even attempted to make out the "prejudice" prong, which is required to show ineffective assistance of counsel. A defendant who claims that he was unethically denied his right to testify in his own defense must set forth the facts that he would have testified to, and establish prejudice by showing that had he been allowed to present these facts there was a "reasonable probability that the verdict would have been different." Brown v. Artuz, 124 F.3d at 80-81.

In this case, it is at the very least improbable, and most likely impossible, that Dhinsa could have credibly rebutted the litany of witnesses, including three coconspirators, who described first hand Dhinsa's multiple murderous endeavors. The cooperating witnesses were corroborated by, among other things: (1) the admission of the hearsay statements of the murder victims, pursuant to United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1983), which demonstrated that Dhinsa ordered Manmohan killed in order to prevent him from becoming a witness regarding the kidnapping of his

brother and that, similarly, he ordered Satindeijit's murder because Satinderjit was actively assisting law enforcement to expose Dhinsa's lucrative pump-rigging scheme and to locate Dhinsa' s fugitive-brother, Gogi; (2) the evidence of cell phone and cell site records which definitely demonstrated Dhinsa's whereabouts prior to, during and after the murder and which were entirely consistent with the cooperators' testimony; and (3) abundant other evidence, including a list of potential victims and the home address of one of those potential victims, recovered during the search of Dhinsa's car.

In the face of the overwhelming evidence presented at trial — evidence that prompted the trial judge to remark that Dhinsa's guilt of the murders was a "certainty" and left the jury with no lingering "residual doubts" — Dhinsa' s denials on the stand would have been easily discredited and could, in a death penalty case, been held against him by the jury in the penalty phase.

In addition, Dhinsa's current denial in his affidavit that he "knew" Satinderjit or Manmohan, see Dhinsa Aff. *¶15-16,* is particularly irrelevant in light of the overwhelming trial evidence that he knew of them, and the complete lack of evidence that they were personally acquainted. Furthermore, his claims regarding Balwant Singh, see Dhinsa Aff. ¶ 18, are also irrelevant in light of the Second Circuit's decision to vacate that count of conviction. Finally, although Dhinsa now claims that his teimony would have shown that the case against him "was the product of government witnesses who had lied and exaggerated their testimony," that very argument was ably and repeatedly made by Mr. Shargel through his highly effective cross exantinations and was emphatically rejected by the jury.

Accordingly, Dhinsa has not established the "prejudice" prong required by Strickland requiring the rejection of his claim of ineffective assistance of counsel.

B Counsel Was Not Ineffective For Failing To Call the Witnesses Identified by Petitioner

Next, Dhinsa complains that counsel failed to call certain witnesses on his behalf. The Supreme Court has stated that 'Tcounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and that the reasonableness of counsel's judgment must be evaluated with "a heavy measure of deference." Strickland, 466 U.S. at 691. Moreover, "[t]he decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial," and, as a tactical decision, if it is reasonably made it "will not constitute a basis for an ineffective assistance claim." United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). –

In this case, Dhinsa was clearly defended by a team, led by Mr. Shargel, that spared no expense in hiring investigators, finding witnesses, pursuing leads and creating material to use in its case and on cross-examination. The decision to employ Christopher Reese to engage prospective government witnesses in conversations about the case proved to be a particularly effective strategy. Viewed through this' prism, Dhinsa's claim that trial counsel was ineffective for failing to call Walter Johnson, Surander Parmer and Margie Jackson should be summarily dismissed. Dhinsa has failed to identify fully the subject matter of their potential testimony and thus cannot show how he was prejudiced by his counsel's alleged deficiency. .; Alexander v.

McCotter, *775* F.2d *595,* 602-03 (5th Cir. 1985). For example, assuming that Walter Johnson would have testified as he set forth in his affidavit that Dodson told him that he implicated Dhinsa because the "feds" wanted him "bad," see Johnson Aff. ¶ 11, such testimony would hardly have negated the overwhelming evidence of defendant's involvement in the murder plots. Rather, such testimony would have been plainly cumulative, given Mr. Shargel's highly effective cross-examination of Dodson utilizing Dodson's own taped conversations with Christopher Reese. In those tapes, Dodson makes far more damaging claims than those purportedly made to Johnson. Moreover, Johnson, a convicted felon serving a life sentence for witness tampering, robbery and narcotics distribution, see United States v. Johnson, 181 F.3d 83, 1999WL 357835 (2d Cir. 1999)(attached as Government Exhibit 1), would hardly have been a credible witness. In short, the decision not to call Johnson was clearly a rational', strategic choice.

Similarly, Dhinsa's claim that Shargel was ineffective for failing to call Surander Parmer or Margie Jackson falls far short. Notably, Dhinsa submits an affidavit from neither potential witness, suggesting the likelihood that they would actually have testified to the facts set forth in the memorandum and telephone call, respectively, was remote. Indeed, Surander Parmer, who invoked his Fifth Amendment rights and refused to testify before the grand jury, (see government exhibit 2), would have been unavailable as a witness. In any event, the fact that the Second Circuit vacated the count of conviction to which his testimony would have pertained — the communication of the threat to murder Balwant Singh — renders his potential testimony completely irrelevant. Finally, as defense counsel knew from receiving the 3500 material, Margie Jackson would have provided testimony extremely damaging to Dhinsa, as she placed his car near

the scene of the Satinderjit murder in a manner consistent with Dodson's testimony. See Government Exhibit 3. Dhinsa's affidavit does not identify how, if at all, her testimony would have been helpful to him. While Dhinsa's current counsel asserts that Jackson "would have offered testimony that [Dhinsa] was not present at the scene," see Kozyra Aff. ¶ 19, the transcript attached to the motion of the conversation between Jackson and Christopher Reese does not support that assertion. Moreover, had she testified to that effect, she would have been brutally impeached by her prior statements to government investigators — a fact of which Mr. Shargel was well aware. In light of the above, electing not to call Margie Jackson or Surander Parmer was clearly a reasonable, strategic choice.

In short, Dhinsa's trial counsel provided him with effective assistance and the jury's verdict should not be disturbed.

Conclusion

For the reasons outlined above, it is respectfully requested that the defendantpetitioner's petition pursuant to 18 U.S.C. § 2255 should be summarily denied in all respects. Alternatively, if the Court wishes to e5and.the record on the "performance" prong, it is requested that a limited hearing be held for the sole purpose of taking testimony on that issue.

Dated: Brooklyn, New York
September 22, 2003
Respectfully submitted,
ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York
147 Pierrepont Street
Brooklyn, New York 11201

BEST AVAILABLE COPY

Catherine Friesen
Ronald White
Assistant U.S. Attorneys
(Of Counsel)

181F.3d83 (Table)
Unpublished Disposition
(Cite as: 181 F.3d 83, 1999 WL 357835 (2nd Cfr.(N.Y.)))
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NOTICE: T

THIS IS AN UNPUBLISHED OPINION.

(The Courts decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use Fl CTA2 s 0.23 for rules regarding the citation of unpublished opinions.) –

United States Court of Appeals, Second Circuit.
UNITED STATES of America, Appellee,
V..
Walter JOHNSON, also known as King Tut, also known at Tut, Defendant-Appellant.

No. 9 *8-1455.*

May 20, 1999.

Appeal from the United States District Court for the Eastern District of New York (Block, J.).

Kevin lames Keating, Esq., Garden City, for Appellant.
Kelley Anne Moore, Assistant United States Attorney (Zachary W. Carter, United States Attorney for the Eastern District of New York) Brooklyn, for Appellee.

Present: WALKER, Jr., POOLER, CJ., and MOTLEY, [*] D.J.

FN* The Honorable Constance Baker Motley, Seoior Judge of the United States District Court for the Southern District of New York, sitting by designation.

**1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Defendant-appellant Walter Johnson appeals from th LiJy 3Q 1998 judgment of the district court convicting him, following a jury trial, of one count of conspiracy to obstruct interstate commerce by robbery, in violation of 18 U.S.C. § *1951;* one count of attempt to obstruct interstate commerce by robbery, in violation of 18 U.S.C. § 1951; one count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and § 841(b)(l)(A); one count of attempt to possess.:with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and § 841(b)(l)(A); and one count of witness tampering, in violation of 18 U.S.C. § 1512. The district court sentenced Johnson to mandatory life imprisonment on three of the counts of conviction. pursuant to 18 U.S.C. § 3559(c)(l) (the 'Three Strikes" statute) and two terms of life imprisonment for the other two convictions. All of Johnson's life sentences are to run concurrenfly.

Johnson contends that there was insufficient evidence to support the jury's verdict with respect to the witness tampering count; that he was denied a fair trial because the

district court failed to give the jury a multiple conspiracies charge; and that the Three Strikes statute is unconstitutional. We consider each of these arguments in turn.

First, we find that there was sufficient evidence to support the jury's verdict on the witness tampering charge. The jury found Johnson guilty of witness tampering for his actions on or about February *5,* 1996. The evidence at trial shoed that, on that date, Johnson and others robbed Crystal Winslow of a mink coat and earrings. This was the third robbery of Winslow by the same group, the other two robberies having had as their object sotne 30 kilograms of cocaine allegedly in the possession of Winslow's boyfriend. Winslow testified that, during the February 5 robbery, Johnson gave her "a list of demands of things to do and things not to do ... like get in my vehicle and to drive and don't look back and don't call the cops, don't tell the police, and threatening me and my mother and things like that"

The witness tampering statute prohibits the knowing use of "intimidation or physical force" or threats to "influence, delay, cir prevent the testimony of any person in an official proceeding." 18 U.S.C. § *1512(b)(l).* To prove witness tampering, the government need not establish that the defendant expressly stated that he would do harm; it is sufficient if the defendant's words or conduct were designed to arouse fear of harm. *See United States v. Jo13n,* 968 F.2d 208, 211 (2d Cir.l992). Nor must the government prove that the defendant knew of official proceedings or potential proceedings or that official proceedings were pending at the time of the alleged intimidation. *See* 18 U.S.C. § 1512(e)(l); *United States v. Romero,* 54 F.3d 56, 61-62 (2d ir.l99S).

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See also United States v. Gabriel, 125 F.3d 89, 103 (2d Cir.1997).

**2 Here, the jury determined that Johjason's actions were intended to arouse fear of harm. We see no reason to disturb that finding. Although Johnson contends that his remarks during the February 6 robbery "amounted to nothing more than the typical exhortation not to disclose the crime *cu77e1ttly* being committed," the jury reasonably could have inferred. that Johnson's actions were designed to arouse far bf harm in Winslow should she cooperate with the police regarding the two previous robberies. *See United States v. Tocco,* 135 F.3d 116, 127 (2d Dir.), *cert. denied sub noin. Ferranti v. United States,* 523U.S. 1096, 118 S.Ct. 1581, 140 L.Ed.2d 795 (1998) (circumstantial evidence sufficient to support witness tampering conviction).

Second, we turn to Johtuon's argument that he was denied a fair trial on account of the district court's failure to *sua sponte* give a multiple conspiracies charge. Johnson failed tO request such a charge at trial and to raise this issue below. Accordingly, he must demonstrate that the district court's failure to give a multiple conspiracy charge constituted plain error. *See* Fed.R.Crim.P. 52(b); *Gabriel,* 125 F.3d at *96-*. To establish plain error, a defendant must show "(1) error (2) that is plain [ ](3) that affects substantial rights," *Gabriel,* 125 F.3d at *9,* and (4) that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano,* 507 U.S. *725,* 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal brackets omitted). Even if plain rror is established, reversal lies within the discretion of the

app ellata court. *See United States v. Gonzalez* 110 F.3d936, *945* (2d Cii. 1997).

Johnsn has not established error, let alone plain error. A multiple conspiracies chargo is generally appropriate where the government has alleged a single, overarching conspiracy but a reasonable jury could find the existence of smaller, independent conspiracies, some of which the defendant did not participate in. *See, e.g., United States v. Johansen,* 56 F.3d 347, 350-51 (2d Cir. 1995). Here, the indictment alleged three separate conspiracies, (l) to disturb interstate commerce through robbery; (2) to possess with intent to distribute narcotics; and (3) to commit witness tampering--all of which Johnson was alleged to have been a central player in. We find no basis for a multiple conspiracy charge in this case.

Third and finally, we turn to Johnson's constitutional argument with respect to the Three Strikes statute, which he raises for the first time on appeal. This statute imposes mandatory life imprisonment on a defendant convicted of a serious violent felony, if that defendant has been convicted on separate occasions of two or more "serious violent felonies." *See* 18 U.S.C. § 3559(c)(l)(A)(i). The statute both specifies certain federal crimes that qualify as "serious violent felonies" and provides a general definition for other crimes that qualify.

**3 Johnson contends that the statute violates the Due Process Clause because it places the burden on a criminal defendant to prove that his crimes do not qualify as "serious violent felonies." Johnson also argues that he was improperly denied a hearing on whether his crimes in this case constituted serious violent felonies within the meaning of the statute. Johnson raised only the latter argument below.

Because Johnson failed to raise the unconstitutionality argument below, he must demonstrate plain error. This he cannot do. To establish plain error, a defendant must establish, *inter alia,* that the error was "plain." *See Olano,* 507 U.S. at 735. "[E]rror is plain if it is clear or obvious under current law ... [or] so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United 'tates v. Gores* 154 F.3d 34, 42-43 (2d Cir.l998) (intemal quotation marks and citations omitted). We do not find that the district court's failure to *sua sponte* find unconstitutional the Three Strikes statute's burden structure constituted 'plain" error. There have been no decisions in this circuit on this issue, and other circuits have only begun to consider it *See, e.g., United States v. Wicks,* 132 F.3d 383, 388-89 (7th Cir.l997) (finding no due process violation in placing burden on defendant); *United States v. Kaluna,* 152 F.3d 1069 (9th Cii.) (finding due process violation), *vacated and rehg in -banc granted* 161 F.3d 1225 (9th Cir.l998). Accordingly, we do not find that the alleged error was plain. *See Gore,* 154 F.3d at 43 (noting diffiàuity of proving plain, error where tbis.circuit has not spolcn on an issue and there is a split in other circuits). With respec to the district court's denial of a hearing on the qualifying offenses, we find that there was no error. While a defendant has a right to be . haard before a district cmirt determines a sentencing fact, that opportunity ntuy be limited to mitten

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submissions if the judge properly views the matters as not reasonably in dispute. *See United States v. Garcia,* 900 F.2d *571, 574* (2d Cir.1990). *See also United States v. Oberle,* 136 F.3d 1414, 1423 (10th Cir.), *cart. denied, 525* U.S. *885,* 119

S.Ct. 197, 142 L.Ed.2d 161 (1998)(hearing warranted under Three Strikes Statute only where defendant "tenders &vidence to deny the seriousness of the former convictions or to deny that the prior c5nvictions pertained to him")

Here, Johnson did not dispute that he had committed two prior felonies that constituted "serious violent felonies" under the Three Sirikes statute. He sought a hearing solely to establish that his convictions in this case dict not qualify as violent felonies within the meaning of the statute. To that end, Johnson proposed to call the government's main witness, Crystal Winslow, to review her testimony regarding the circumstances of the crimes of which the jury convicted him. The district court found that there was nothing to be "accomplished by recalling" this witness to the stand. In these circumstances, we find that there was no error in denying Johnson ahearing.

**4 For the foregoing reasons, the judgment of the district court is AFFIRMED.

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AUGUST 6 1998

UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT OF NEW YORK
ONE PIERREPONT PLAZA
BROOKLYN, NEW YORK 11201
ATTN: AUSA KRIS KOPPEL

RE: SURANDE PARMAR

DEAR SIRS:

Please be advised that our office has been retained to represent Mr. Surander Parmar with respect to your request to have him testify before a Grand Jury. In an effort to investigate and gather all relevant facts, I am requeting that you inform me as to whether or not my client has made any statements to law enforcement and provide us with the substance of any such statements.

If and when all statements are provided, I will then be able to counsel my client to the best of my abilities.

In the interim, since it is our understanding that Mr. Parmar may be a target of investigation if called before a Grand Jury, Mr. Parmar would invoke his Fifth Amendment Privilege Against Self-Incrimination.

Please feel free to contact me if you have any questions, or if you need to discuss this matter any further.

Very truly yours,
s/Joseph Mure, Jr.
Joseph Mure, Jr.

JM:lag

Ft -302 (Rev. 16-6-95)

—1—

FEDERAL BUREAU OF INVESTIGATION

116-NY-262801 Date of transcrption 11/18/97

MARGIE JACKSON, Brooklyn, New York, telephone number _____was interviewed at the United States Attorney's Office, Eastern District of New York, Brooklyn, New York. Also present duringthe interview was Assistant United States Attorney (AUSA) BENTON CAMPBELL. After being advised as to the identities of AUSA CAMPBELL and Special Ageht (SA) JAMES GLYNN, JACKSON provided the following information:

JACKSON first met MARVIN DODSON when she was approximately 18 years old. JACKSON had met DODSON through mutual friends. JACKSON had dated DODSON for a short period of time. JACKSON stated that she was with DODSOL when he was shot several years ago at the RED HOOK HOUSES in Brooklyn, New York. JACKSON stated that she was aware that DODSON was dealing in narcotics, however, she had no involvement with DODSON's business JACKSON stated that she subsequently lost contact DODSON for approximately five years until she ran into him 1997

After five years, JACKSON saw DODSON on Father's Day 1997, while she was driving down Atlantic Avenue, Brooklyn' York. JACKSON stated she stopped the vehicle and began to tálk. to DODSON. JACKSON stated that they talked for approximately one hour and after exchanging greetings, DODSON gave JACKSON his pager number. JACKSON advised that she subsequently talked to DODSON on the phone and both agreed to meet at the

McDONALD' S Restaurant on Atlantic Avenue. JACKSON advised that she arrived at the MODONALD'S Restaurant and waited for DODSON for approximatelr 45 minutes. JACKSON advised that the reason she was, meeting DODSON at the McDONALD's Restaurant was to' rekindle, a relationship. JACKSON stated that she contacted DODSON from a pay phone at the McDONALD's Restaurant. Shortly thereafter, DODSON arrived driving a blue Suburban.

DODSON asked JACKSON to follow him in her vehicle. JACKSON stated that they drove for approximately three city blocks. DODSON parked the Suburban and got into JACKSON's 1985 Oldsmobile. DODSON informed JACKSON that he had purchased a car and he wanted to show JAdCSON the vehicle. DODSON drove JACKSON'S dar because she was not familiar with the streets. JACKSON stated that DODSON had driven to Queens in close proximity to a train station. DODSON had circled the area looking for a parking spot. JACKSON stated that it was around lunchtime when she told DODSON that she was hungry. DODSON stated that he knew of a store which made great turkey sandwiches. JACKSON stated that she went into the sub shop and ordered a sandwich. While in the shop, JACKSON used the ladies room. JACKSON further advised that she exited the store and went towards the right and around the corner where DODSON was parked near a pay phone. JACKSON recalled that the location where DODSON had parked the vehicle was in the rear of a children's clothing store. JACKSON walked up to the car and got into the passenger seat. JACKSON asked DODSON if he wanted part of her sandwich DODSON took a small portion of the sandwich As they sat in the vehicle, they talked about people that they knew Thereafter, JACKSON stated that she was going to finish her sandwich and leave DODSON replied that she could leave ·•. JACKSON stated that she believed DODSON was a little nervous and was constantly looking

around. JACKSON stated that DODSON was not paying attention to her while they sat in the vehicle. DODSON drove approximately three blocks before he pulled over and gave JACKSON a kiss and exited the vehicle. JACKSON advised that she lifted the arm rest and slid over to the driver's side of the vehicle.

JACKSON was questioned whether she ever observed DODSON in possession of a firearm. JACKSON stated that she observed DODSON with a firearm in his waist band while in Brooklyn. JACKSON advised that it was no concern to her because she always knew DODSON had carried a firearm from previous years.

JACKSON advised that while eating her sandwich she observed a beat up white van drive by on two - three occasions. JACKSON stated that she observed a driver and passenger in this white van. JACKSON stated that she also observed another white van which an individual had parked arid got out of the vehicle and walked away.

JACKSON also oberved a 4-door black luxury car with tinted windows. JACKSON stated that she believed this luxury car was either a Lexus or Maxima. JACKSON stated that this vehicle was parked approximately four car lengths ahead.

JACKSON stated that she also observed a guy painting a picture on a garage or house at this location.

After JACKSON had dropped DODSON off and she slid over to the driver's side, she drove to the corner and passed the beat up white van. JACKSON stated that at this intersection she made a right hand turn and went approximately two b1ock.

As JACKSON was seated at a light at this location, the beat up white van caine u from behind and began beeping the horn. JACKSON advised that it appeared that this van was trying to get by her. JACKSON advised that she heard an individual yell ''Why don't you move out of the way?" At the seine time, JACKSON-hears '-.- DODSON knocking at the passenger side of her vehicle. DODSON opens the passenger door and jumps into the vehicle. :At this point, DODSON is out of breath. As DODSON attempted to catch his breath, he told JACKSON to follow the black car. JACKSON -advised : that this black car was the same black luxury car which she noticed parked while she was eating her sandwich. JACKSON stated that she drove several blocks when she turned and followed a street which was located under the elevated train line. JACKSON stated that she continued to drive until she followed the black car into a gas station.

The individual that drove the black car approached DODSON as he exited JACKSON's vehicle. DODSON walked towards the back of JACKSON's vehicle and began to lean on the trunk as he talked to this individual. JACKSON advised that throughout this whole time she was looking at DODSON and this individual through the rearview mirror.

JACKSON stated she also observed a white van inside the bay area of the gas station. JACKSON stated that she observed two Black males and an Indian male inside the bay area. JACKSON stated that the Indian guy appeared scared as he pulled the garage door down half way JACKSON stated that while DODSON was talking to the individual who drove the black car, It appeared that DODSON had passed sothething to this individual. JACKSON further advised that the individual who drove the black car was also an Indian male.

JACKSON advised that when they returned to Brooklyn, DODSON no longer had the gun. JACKSON stated that she knew this because when she hugged DODSON she no longer felt a gun on his body.

JACKSON advised that as they left the gas station, she recalled making a left hand turn and going approximately three or four blocks and hitting the highway. DODSON asked JACKSON to take him back to where he had dropped off his car. DODSON directed JACKSON to the inter-borough and dropped him off at his home. As DODSON exited the vehicle, he told JACKSON to page him later. JACKSON stated that she got out of her vehicle and hugged DODSON. JACKSON reiterated that she did not feel agun at this. time.

JACKSON was questioned regarding her response when DODSON reappeared at her vehicle after she had just dropped him off. JACKSON replied that she commented, "What the hell are you doing here?" DODSON made no comment to JACKSON. JACKSON reiterated that at this point DODSON was breathing heavy and appeared out of breath. JACKSON stated that it was not out of character for DODSON not to answer her question.

JACKSON advised that on the following day she met DODSON on Marcy Avenue. JACKSON stated that she had previously spoken to DODSON about owing back rent. When she met IDODSON, DODSON took out a sum of money and counted it and gave JACKSON $500.00 in $50.00 denominations. JACKSON took a small portion of the money she received from DODSON and purchased beer for everyone who .was hanging out on Marcy.Avenue. JACKSON further advised that she used $420.00 to pay the rent and $150.00 to pay her phone bill. JACKSON stated that the proceeds from DODSON and money she had saved went to pay the rent and phone bill.

Approximately three or four days later, JACKSON saw DODSON as DODSON drove through Red Hook. JACKSON was sitting outside her residence with several girlfrietds. JACKSON thanked DODSON for helping out with her expenses. DODSON mentioned to JACKSON that there was some case pending and that he may be going to jail. JACKSON stated that that was the last contact she had with DODSON, however, she did attempt to page him on several other occasions, but he never returned her page.

JACKSON advised that DODSON had a reputation as a drug dealer. JACKSON stated she never personally observed DODSON dealing drugs however, word on the street was that he was involved in dealing. JACKSON further stated that she knew DODSON to carry a firearrn on a regular bääis.

JACKSON advised that she was first introduced to an individual known as JAZZ by DODSON when they were drinking beer on Marcy Avenue. DODSON told JACKSON that JAZZ was his cousin.

JACKSON advised that she had no knowledge of what occurred on the streets in Queens when she drove DODSON. JACKSON stated she was contacted by Detective BRIAN QUINN, Queens Homicide Squad, who displayed a photo spread. JACKSON advised that she identified the Indian male and initialed the picture in the photo spread. JACKSON reiterated to this day she is unaware of what occurred in Queens, however, assumes that DODSON may have killed somebody because of the contact with Queens Homicide.

JACKSON further advised that the license plates on the beat up white van were Pennsylvania plates.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,
Plaintiff,

Against

MEMORANDUM AND ORDER

GURMEEET SINGH DHINSA,
Defendant-Petitioner.

CV-02-6156(ERK)
CR-97-0672(ERK)

----------X:.

Korman, Ch. J

Petitioner's trial counsel, Gerald Shargel, Esq. is directed to file an affidavit responding to the ineffective assistance of counsel claim raised in the petition.

SO ORDERED:
s/Edward R. Korman
Edward R. Korman
United States District Judge

Brooklyn, New York
September3O,2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
United States of America

v. CV-02-6156
Cr-97-0672
Gurmeet Singh Dhinsa **AFFIDAVIT**
----------X

GERALD L. SHARGEL, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the Eastern District of New York since January 8, 1971. I have been admitted to practice in the State of New York since December of 1969. Since my admission, I have defended at trial more than 100 federal criminal cases.

2. I was the lead attorney for Gurmeet Siugh Dhinsa, defendant in the above-captioned matter, trying his case to a jury in 1999. During trial, my co-defense counsel were David Rulinke, Jeffrey Lichtman and Seth Ginsberg. Two private investigators assisted me in preparing and defending the case.

3. Since the Dhinsa case, I have tried at least 12 criminal cases, including complex RICO and securities fraud cases. Since 1999, I have represented dozens of other clients whose cases did not go to trial but nevertheless often involved complex motions and hriigs.

4. With my crowded caseload and the passage of nearly five years since Mr. Dhinsa's trial. I do not have sufficient memory to refute the defendant's allegations about the conversations that he claims to have had with me or to recollect the tactical decisions that I made during trial.

5. 1 have reviewed the submissions made by both parties in this post-conviction proceeding. They do not refresh my recollection. I have no notes, nor is it my practice to make such notes, that record my conversations with my client or my thinking process on whether to call a particular defense witness.

Dated: New York, New York
October 5, 2003

S/Gerald L.Shargel
Gerald L. Shargel

Sworn to before me this
7th day of October 2003

Notary Public

MARC A. FERNICH
Notary- Public State of New York
No. 02FE507407S
Qualified in NewYork County
Commision Expires 3/10/04

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEWYORK

----------X

UNITED STATES OF AMERICA,
Plaintiff,

ORDER

-against- 02-CV-6 1 *56(ERK)*

GURMEET SINGH DHINSA,
Defendant-Petitioner.

----------X

Konnan, Ch. J.

In light of the affidavit submitted by Mr. Shargel, petitioner is directed to address the issue whether the petition should be dismissed because the United States Attorney has been prejudiced in her ability to respond to it due to delay in its filing. Rules Governing Section *2254* Cases, Rule 9(a). While the petition here is brought pursuant to *28* U.S.C. § *2255,* it may be applied here "at the discretion of the district court." Rule 1(b).

The response should be filed within 14 days of the date of this order.

SO ORDERED:
s/Edward R. Korman
Edward R. Korman
United States Chief District Judge

Brooklyn, New York
October *28, 2003*

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LYNNE M. GACHETTI
(1)MEMBER OF NJ & NY BARS

December 8, 2003

Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

MOVANTS COUNSEL IS DIRECTED
TO SERVE A COPY OF THIS ORDER
ON ALL PARTIES UPON RECEIPT

This office represents Gurmeet Singh Dhinsa with respect to a petition for relief from his conviction and sentence pursuant to 28 U.S.C. §2255 W. e are writing this 1etter-in confirmation of a telephone converation that I had with one of Your Honor's law clerks this afternoon.

I explained to your clerk that Your Honor issued an Order on October 28, 2003 directing that the issue of

prejudice to the Government (in light of an Affidavit furnished by pedecessor counsel Gerald Shargel) be filed within two weeks. Unfortunately, when the Order was received it was misread as asking the Government to make the appropriate filing when in fact the Order was directed to this office. We realized this error earlier today when we were reviewing -the file-and-the Order.

I would ask the Court for seven (7) days from today's date to make that filing. I apologize for any inconvenience to the Court and to the Government by reason of this oversight. We have not asked the Court for any other extensions of time to file papers in this matter. By copy of this letter, I am notifying Assistant United States Attorney Catherine Friesen of this request

If Your Honor requires a further submission, please advise.

Respectfully submitted,
s/Barry A. Kozyra
BARRY A. KOZYRA

BAK:cml
cc: Catherine Friesen, Asst. U.S. Attorney (By Telefacsmile)

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LYNNE M. GACHETTI
(1)MEMBER OF NJ & NY BARS

December 11, 2003

VIA FEDERAL EXPRESS
Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

This office represents the petitioner, Gurmeet Singh Dhinsa, with respect to apetition for relief from his conviction and sentence pursuant to 28 U.S.C. §2255. Mr. Dhinsa's petition was filed with the Eastern District of New York on November 29, 2002 after its original filing in the Central District of California on September 16, 2002. On January 8, 2003, Your Honor issued an Order to Show Cause ordering the United States Attorney for the Eastern District ofNew York to file a response to Mr. Dhinsa's petition within sixty days as to why the motion should not be granted. Over

the next nine months, the Government issued repeated requests for extensions of time to file its responding papers, all of which were granted by Your Honor. During that time, the Government's proffered reason for the extensions-were its need to obtin transcripts of a charging conference held before the Court. It was our understanding from Assistant United States Attorney Catherine Friesen that the Government contended that one of the issues addressed by the petition (that Mr. Dhinsa was not advised of his constitutional right to testify at his trial) was specifically addressed during the charging conference before Your Honor. It was presumablr the Government's position those rights were waived by Mr. Dhinsa during a recorded discussion.

On or about September *22,* 2003, this office received the Government's Opposition Brief to Mr. Dhinsa' s petition. In the Government's brief, the Government fails to cite to any portion of the record, including the charging conference, in which Mr. Dhinsa's waiver of his constitutional right to testify was discussed or even mentioned. The Government simply assumes that "it is highly unlikely ... that Mr. Dhinsa's claims are true," without citing to the record. United States' Memorandum in Opposition to the Defendant's Motion Pursuant to *28* U.S.C. *§2255,* p. 12. However, the Government never suggests.that it has been prejudiced by any delay in the filing of Mr. Dhinsa's petition.

On September 30, 2003, Your Honor issued a Memorandum and Order to Gerry L. Shargel, Esq., Mr. Dhinsa's lead trial counsel, directing Mr. Shargel to file an affidavit responding to the ineffective assistance of counsel claim raised in the petition. Mr. Shargel promptly provided the Court with an affidavit, dated October 7, 2003, in which he certifies that he does not have sufficient memory to refute the petitioner's allegations about the conversations that the petitioner claims to have had with him (in his *§2255* motion

papers) or to recall the tactical decisions made at trial. See Affidavit of Gerty L. Shargel, ¶ *4, 5.*

On October 28, 2003, Your Honor issued an Order directing the petitioner to address the issne of whether the petition should be dismissed because theUnitd States Attorney has been prejudiced in her ability to respond due to a delay in the petition's filing.

Your Honor has issued the October 28, 2003 Order *sua sponte* and without the Government's contention that it has been prejudiced due to delay in Mr. Dhinsa's filing of his petition pursuant to §*2255.* Accordingly, it is our position that the Court is constrained to hold that the claim is properly before it. See Ida v. United States, 191 F.Supp. 426, 436-37 (S.D.N.Y.2002). Nonetheless, we have attempted to address the issue of prejudice to the Government as per your Order.

Rule 9(a) of the Rules Governing Section2255 Proceed-ings for the United -States District Courts provides:

> *Delayed petitions.* A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shoW that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

28 U.S.C.A. foll. §2255 (2003).

A respondent seeking to dismiss a habeas petition under Rule 9(a) faces a "heavy burden" in proving a laches defense. See Dumas v. Kelly, 105 F.Supp.2d 66, 69-70 (E.D.N.Y.200O)(citing Hughes v. Iryj, 67 F.Supp. 775, 779 (E.D.N.Y.1997)). The respondent must: (1) make a

particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, .and (3) that the petitioner has not acted with reasonable diligence as a matter of law. If the respondent fails to establish any one of these elements, its Rule 9(a) motion fails. See Id.

With respect to the first prong of the Rule 9(a) dismissal analysis, prejudice to the government may not be merely presumed from the absence of a transcript or of witnesses necessary to recount the details of a proceeding.See Cotto v. Lord, 2001 WL 21246 at 6 (S.D.N.Y.2001). Rather, the Government thust actuallybe disadvantagedbythe absence of such resources in responding to the particular allegations or theories asserted by the petitioner as grounds for habeas corpus. See Id.

The Government has not demonstrated or proffered any showing of prejudice as required by law. Full transcripts from the trial proceedings are available for the Government's review and for the Court's review. In fact, the Government delayed its response to the petition for nearly ten months as they presumably conducted a review of the trial transcripts (in which they previously asserted that Mr. Dhinsa had knowingly waived his constitutional right to testify). However, the Government has failed to cite any portion of the transcript which supports such assertion.

Moreover, to merely assume that the Government is prejudiced byMr. Shargel's lack of recollection as to whether he advised Mr. Dhinsa of his constitutional right to testify and whether Mr. Dhinsa waived such right is far too speculative to warran± dismissal of the petition. Mr. Shargel has not refused to provide an affldavit so as to create any adverse inference as to Mr. Dhinsa's allegations. Mr. Shargel has not sworn that he did in fact advise Mr. Dhinsa of his right to testify. He states that he does not recall having any

such discussion with Mr. Dhinsa due to his case load. See Affidavit of Gerry L. Shargel, ¶ *4, 5.* Mr. Shargel's affidavit provides nothing interms of evidence to support an argument that the Government has been prejudiced. If anything it corroborates Mr. Dhinsa's recollection that the issue was not addressed.

"If the respondent fails to make the required showing of prejudice, it is irrelevant whether the petitioner was diligent or not in filing his habeas petition." Dumas v. Kelly, 105 F. Supp.2d 66, 70 (E.D.N.Y.2000)(citing Smith v. Duckworth, 910 F.2d 1492, 1496 (7th Cir.1990). However, assuming that the Government is able to satisfy the prejudice prong under the Rule 9(a) dismissal analysis, they must still show that the prejudice was caused by the petitioner having filed a late petition. Moreover, the Government mut prove that the prejudice was caused bythe petitioner's undue delay, and not the mere passage of time alone. See Quinones v. Miller, 2003 WL2 1276429 at 23 S.D.N.Y.2003)(quoting Pacheco v. Artuz, 2001 WL 1134864 at 4 (S.D.N.Y.2001)).

There is no issue as to Mr. Dhinsa's timely filing of the petition. His petition papers were appropriately filed within the statute of limitations set by the Antiterrorim and Effective Death Penalty Act of 1996 ("AEDPA")[1]. Mr. Dhinsa's filing was within one year of the date on which the

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[1] Before passing Rule 9(a), Congress deleted a provision from the draft version that would have created a rebuttable presumption of prejudice only after a delay of five or more years. See Lonchar v. Thomas, 517 U.S. 314, 327 (1996). Congress concluded that such a presumption would be inconsistent ith habeas relief's equitable purposes. See id. (quoting H.R.Rep. No. 94-1471 at 5(1976)("It is unsound policy to require the defendant to overcome a presumption of prejudice.")).

final judgment became final, as required bythe AEDPA.' Moreover, Mr. Dhinsa and his counsel clearly acted with reasonable diligence as a matter of law in investigating the facts, meeting with Mr. Dhinsa and reviewing the trial transcript before filing the petition. Mr. Dhinsa's judgment of conviction did not become final until his petition for writ of certiorari was denied by the United States Supreme Court in late-2001 (following an appeal to the United States Court of Appeals for the Second Circuit). His petition for writ of habeas corpus was filed on September 16, 2002 in the Central District of California, where the petitionör is incarcerated. The petition was dismissed without prejudice for lack of jurisdiction and immeadiately re-filed in the Eastern District of New York on November 20, 2002. It cannot reasonably be argued that the petitioner is responsible for any "undue delay" with respect to his case as he has diligently pursued his appellate and post-conviction relief Options over the past four years.[1] Therefore, the Government also fails 'to satisfy the second and third prongs of the Rule 9(a) dismissal analysis.

The Government cannot overcome the "heavy burden" standard set forth by the Eastern District in Hughes, *supra.* at 779. It appears as though the Government's only argument rests on the passage of time (albeit a short period of time) since the conclusion of, the criminal trial and the exercise of Mr. Dbinsa's appellate rights. "Tardiness is irrelevant where a constitutional issue is raised and where the

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[1] In Hughes v. Irvin, 967 F.Supp. 775, 779 (ED.N.Y.1997), the Government's motion to dismiss was denied since the Court found. that the petitioner had diligently pursued his appellate and post-conviction relief options over nearly seventeen years.

prisoner is till confined." McKinney v. United States, 208 F.2d 844, 846-47 (D.C.Cir.1953).

We ask the Court to draw an adverse inference to the Government's failure to demonstrate (as previously alleged) that Mr. Dhinsa was aware of his right to testift at the above trial and waived that right knowingly. Mr. Dhinsa remains incarcerated in the federal prison facility at Lompoc, California, and the Government should not be afforded an additional unsubstantiated defense to the instant habeas petition. We submit that Mr. Dhinsa's constitutional rights have been violated and request the scheduling of a full evidentiary hearing at this time.

Respectfully submitted,
s/Barry A. Kozyra
BARRY A. KOZYRA

BAK:rg
• cc: Gatherine Friesen, Assissant United States. Attorney (via-Federal-Express)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,
Plaintiff,

against

GURMEET SINGH DHINSA,
Defendant-Petitioner.

MEMORANDUM & ORDER
02-C V-6156(ERK)
97-CR-0672(ERK)

----------X

Korman, Ch. J.

Petitioner's response to my inquiry on his delay in filing the petition relies in part on the fact that his petition was filed within the prescribed one-year period of limitations. The petition was filed three years after he was sentenced. The applicability of the doctrine of laches applies precisely to a case in which the action is filed within the statute of limitations. Otherwise the doctrine would serve no purpose. Nevertheless, petitioner's response caused me to examine the history of the case to determine whether the petition was timely filed.

The Supreme Court denied the petitioner a writ of certiorari on October 1, 2001. Dhinas v. United States, *534* U.S. 897,122 S.Ct. 219(2001). The petition was not filed here until November21, 2002. This was more than one year after the petition was denied. While petitioner filed his initial petition on September 16, 2002, in the Central District of California, it was dismissed without prejudice for lack of jurisdiction. The period of time during which the petition was pending in California did not toll the statute of limitations. Cf. Duncan v. Walker, 533 U.S. 167,121 S.Ct. 2120 (2001).

The latter case held that a petition for a writ of habeas corpus which was dismissed without prejudice did not toll the one-year period of limitations during the period in which it was pending. The holding was based on the language of a specific tolling statute for properly filed applications for state post-conviction relief. 28 U.S.C. § 2244(d)(2). Unlike the period of limitations for state petitions, 28 U.S.C. § *2255* ¶ 6 does not provide for tolling during the pendency of post-conviction petitions. See Johnson v. United States, 246 F3d *655,* 660 (6th Cir. 2001) (Because a collateral challenge is a separate proceeding that does not interfere with the finality of the judgement attacked,... [it] has no per se impact on the AEDPA limitation period").

Accordingly, petitioner is ordered to show cause within ten days why the petition should not be dismissed on the ground that it was not filed timely.

SO ORDERED:
s/Edward R. Korman
Edward R. Korman
United States Chief District Judge

Brooklyn, New York
December 19, 2003

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December 29, 2003

VIA TELEFACSIMILE AND FEDERAL EXPRESS

Hon. Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Gurmeet Singh Dhinsa v. Al Herrera
Civil Docket No. 02-6156 (ERK)

Dear Chief Judge Korman:

This office represents the petitiáner, Gurmeet Singh Dhinsa, with respect to a petition for relief from his coniition and sentence pursuant to 28 U.S.C. *§2255.* On Decembr 19, 2003, Your Honor requested that this office show cause as to why the petition should not be disiaissed on the ground that it was not timely filed, citing to Duncan v. Walker, 533 U.S. 167 (2001) and Johnson v. United States, 246 F.3d *655* (6th Cir.2001). There is no direct case on point addressing Your Honor's inquiries in the unusual factual circumstance *sub judice,* as the two cited case are factually and legally

distinguishable. However other cases do provide a clear direction that allows for the goal of justice to be achieved by allowing Mr. Dhinsa's petition to be heard. Please accept this letter memorandum in lieu of a more formal brief inresponse to Your Honor's request.

There is no genuine issue as to Mr. Dhinsa's timely filing of a petition for the very relief sought before this Court. Petition papers were filed on September 16,2002, within the statute of limitations set by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") Mr. Dhinsa's filing was within one year of the date onwhichthe final judgment became final, as required by the ARDPA. Prior to filing, Mr. Dhinsa and his counsel acted with reasonable diligence as a matter of law in investigating the available facts, meeting with Mr. Dliinsa, and reviewing the extensive trial transcript before filing the petition. Mr. Dhinsa's judgment of conviction did not become final until his petition for writ of certiorari was denied by the United States Supreme Court on or about October 1, 2001 (following an appeal to the United States Court of Appeals for the Second Circuit). A petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 was filed less than one year later on September 16, 2002 in the Central District of California, where the petitioner is incarcerated. Mr. Dhinsa was viewed as within his rights to file the petition in the Central District of California as he is considered a realdent of the district while serving a life sentence in the United States Penitentiary in Lompoc, California.

Upon review of the papers, the Central District of California Court *sua sponte* and without prior notice of hearing, recast the application as more appropriately a *§2255* petition and declined jurisdiction based on the fact that the "petitioner has failed to make the requisite showing that Section 2255 is an inadequate or ineffective remedy." See Exhibit A. The Court further noted that "there is nothing

BEST AVAILABLE COPY

which prevents him [Mr. Dhinsa] from bringing a Section 2255 petition in the sentencing court." However, Mr. Dhinsa's petition was incorrectly dismissed without prejudice (instead of being transferred to the identified sentencing court, see *infra)* for lack of jurisdiction in an Order dated September 23, 2002. But that decision was not filed until October 2, 2002 and counsel was not given notice until October 7, 2002, after the one year date in the AEDPA. As noted, there was no prior communication from the Court to counsel (or to Mr. Dhinsa) as to disposition of the matter prior to the dismissal.

While the Order was signed on September 23, 2002, it was not filed until October 2, 2002 and was not received by this office until October 7, 2002, the latter two dates of which were after the one year statute of limitations set forth in the AEDPA. The habeas petition was thereafter re-filed with the Eastern District of New York under Section 2255 where it has remained open for the past thirteen months. At no time was the filing date questioned as it would relate back to the date of actual filing (September 16, 2002) as a matter of law. During those thirteen months, the Government has issued repeated requests for extensions of time to file its responding papers, all of which were granted by Your Honor in the interest ofjustice. However, the Government has never raised the issue of a limitation bar for Mr. Dhinsa's filing under the AEDPA, apparently acting with the same good faith understanding that the effective filing date was September 16, 2002 and shoiiid be so observed in the interest of justice.

The federal statute governing a habeas corpus petition provides that "writ of habeas corpus maybe granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.' 28 U.S.C. §2241(a). As evidenced by the Order issued by Judge Phillips in the Central District of California, the Court declined consideration of the writ for lack of jurisdiction

despite the fact that the petitioner is present within the territorial jurisdiction of the Central District of California citing to the "burden" of hearing such a habeas corpus application where there was available the more convenient jurisdiction of the sentencing court." Thus Judge Phillips determined that since Mr. Dhinsa's conviction and sentence were imposed by the District Court for the Eastern District of New York, the petition would be more conveniently presented in the Eastein District Since the federal court in the Eastern District can and has in fact exercised jurisdiction over this petition, federal law mandated transfer to that court, not dimissal. Judge Phillips certainly could not have meant to prejudice Mr. Dhinsa by failing to tranfer the case and having the Order delivered after the one year filing deadline. (Ironically, Judge Phillips' Order has a box cheked "Priotity.") Th laws and rules which are designed to provide justice cannot be so mechauically applied.

> Whenever a civil action is filed in a court .. and that court finds that there is a want of jurisdiction, the Court shall, if it is in the interest of justice, transfer such action.. to any othet such court in which.the action or appeal could have been brought at the time it was filed or noticed

28 U.SC.A. §1631 (2003).

In Miller v. Hambrick, *905* F.2d 259 (9th Cir.1990, the Court of Appeals for the Ninth Circuit stated:

> [T]ransfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is "time- consuming and justice defeating." ... [This approach] was adapted to habeas corpus in applying 28 U.S.C. §2241(d), the provision to habeas corpus in a State which contains two or -more judicial districts ... Now under 28.U.S.C. §1631 the same

approach can be taken generally in habeas corpus pioceedings

Id. at 262 *(quot* Goldlawr. Inc. v. Eithan, 369 U.S. 463, 467 (1962)).

More recently in Cruz Aulera v. *FNS, 245* F.3d 1070 (9th Cir.2001), the Ninth Circuit cited the above language from Miller and added that "because the statute's langüage is mandatory, federal courts should consider transfer without motion by the parties." Id. at 1073-74.

Transfer to the district court of approptiate juridiction is required if the following condition are met: (1) the transfering court lacks juridiction, (2) the transfering court could have exercised jurisdiction at the time the action was filed, and (3) the transfer is in the interest of justice.Id. All three cnditions have been met as (1) Judge Phillips dismissed the petition for lack of jurisdiction, (2) the Eastern District of New York could have exercised jurisdiction at the time the petition wäs filëd on September 16, 2002, and (3) it is clearly "in the interest of justice" to preserve Mr. Dhinsa's right to habeas relief from dimissal for being untimely where the petitionerfailed to receive any notice of the dismissal until after the expiration of the statute of limitations under the AEDPA. (Ironically if dismissal by this Court were considered, Mr. Dhinsa might be compelled to return to the Central District of California for relief which would recreate the burden that the California Court was attempting to avoid by placing the matter before the sentencing court.)

The courts in the Second Circuit have expressly recognized the importance of protecting a petitioner's habeas rights when faced with circumstances virtually identical to those in the instant matter. In Moore.v. White, L8a F.Spp_.2d 411 petitioner filed a petition for writ of habeas corpus pursuant

to §2241 in the United States District Court, District of Connecticut. The Connecticut District Court found that the grounds for the petition would have been properly challenged by bringing a motion in the court where the petitioner was sentenced, pursuant to §2255. The Court concluded that it would be "in the interest of justice" to transfer the petition to the Northern District of New York under28 U.S.C. §1631 as a *§2255* motion.' See Id.at 413[1]. While the Court eventually held that the petitioner was procedurally barred from pursuing relief under *§2255,* it was because her original §2241 petition was filed more than four months following the expiration of the One year limitation period set forth by the AEDPA. The latter holding would not apply in the instant matter as Mr. Dhinsa's petition was clearly filed within the one year time period permitted.

Your Honor has referenced Duncan v.. Walker, 533 U.S. 167 (2001), for the proposition that the poriod of time during which the petition was pending in California did not toll the statute of litmitations. However, the holding is inapplicable to the instant matter for everal reasons. First, the petitioner in Duncan. sought tolling of the statute of limitations during the pendency of his first petition for habeas corpus.2 The current petition is Mr. Dhinsa's first and only petition filed. Second, the petition for writ of habeas corpus in Duncan was dismissed without prejudice with more than nine mortths remaining in the limitation period (and of which

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[1] The Second Circuit has held that when a petitioner has never filed a *§2255* motions, a district court may not recharacterize a motion purportedly mad.e under some other rule as a *§2255* motion unless the district court finds that, nothwithstanding the designation, the motion should be considered as made under §2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the rather than have it so recharacterized. See Adams v. United States, *155* F.3d 582 (2d Cir.1998). This is a non-issue in the instant matter for two reasons. First, neither Mr. Dhinsa nor his counsel were ever offered the opportunity to withdraw the motion. Second, Mr. Dhinsa would not have objected to the recharacterization of his petition as evidenced by his filing ofthe §2255 motion independently.

petitionet presumably had notice) during which the petitioner had the opportunity to cure the petition's defects that led to the dismissal. See Id. at 170-71. As previously noted, neither Mr. Dhinsa nor his counsel were advised of the dismissal of the petition without prejudice until after expiration of the statute of limitations. If literal application were given to the AEDPA and the mandate of 28 U.S.C. § 1631 were ignored, Mr. Dhinsa's right to habeas would be destroyed by simple Court administration and the failure to timely communicate — without any determination on the merits.

In addition, the Second Circuit has recognized that the one-year deadline for filing a *§2255* petition is a statute of limitations rather than a jurisdictional bar so courts may equitably toll the limitations period. See Green v. United States, 260 F.3d 78, 82 (2d Cir.2001); see also Smith v. McGinnis 208 F.3d *13,* 17 (2d Cir.2000). Equitable tolling applies under circumstances where the defendant has acted with reasonable diligence throughout the period he seeks to toll. See Id.. *(citing* Johnson v. Nyack Hospital, 86 F.3d 8, 12 (2d Cir.1996)). The rare and exceptional circumstance in the instant matter have been set forth and are irrefutable. Moreover, Mr. Dhinsa and his counsel have acted with reasonable diligence at all times in investigating the facts, meeting with Mr. Dhinsa and revieing the extensive tirial transcript before filing the petition. In a similar vein, we have always attempted to answer any questions of this Court with dispatch. Had we been advised by the Central District of California that it viewed Mr. Dhinsa's application as more appropriate under Section *2255,* we

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The petition serving as the basis for appeal inDuncan was the petitioner's second application for habeas corpus. Thus, he was not denied any and all opportunities for judicial review of the habeas relief sought.

filing the petition. In a similar vein, we have always attempted to answer any questions of this Court with dispatch. Had we been advised by the Central District of California that it viewed Mr. Dhinsa's application as more appropriate under Section *2255,* we vould have simply asked the Court to transfer the application so as to epedite the petition and to avoid prejudice to Mr. Dhinsa.

Mr. Dhina's judgment of conviction did not become final until his petition for writ of certiorari was denied by the United States Supreme Court in October 2001 (following an appeal to the Uhited States Court of Appeals for the Second Circuit). His petition for writ of habeas corpus was filed on September 16, 2002 in the Central District of California. The petition was dismissed without prejudice for lack of jurisdiction and re-filed in th Eastern District of New York. It cannot reasonably argued that the petitioner is responsible for any prejudice or any undue delay with respect to his case as he has diligently pursued his appellate and post-conviction relief options.

Mr. Dhinsa faces the harsh consseqence of foreclosure of review of a meritorious constitutional claim due to a procedural or administrative error in not treating the Order as a priority for purposes of communication on the part of the California Central District Court. Denial of Mr. Dhinsa's right to habeas relief for adherence to a black line rule without fair consideration of the unique circumstances of his case would defeat any notion of fairness and justice in our judicial system. The Court should not dismiss this petition without a complete review of the substantive issues before it. Mr. Dhinsa remains incarcerated in the federal prison facility at Lompoc, California where he serves a life sentence. The Government should not be afforded an additional and unsubstantiated attack on the instant habeas petition simply because the California court did not properly transfer the petition and failed to provide proper and timely notice of its

anticipated action. We again submit that Mr. Dhinsa's constitutional rights have been violated and request the scheduling of a full evidenliary hearing at this time. Thank you for Your Honor's attention and consideration.

Respectfully submitted,
s/Barry A. Kozyra
BARRY A. KOZYRA

BAK:rg -
Enclosure
cc: Catherine Friesen, Asst. U.S. Atorny (via Telefacimile)

Westlaw.

2001 WL21246
2001 WL 21246 (S.D.N.Y.)
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H
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Juanita COTTO, Petitioner,

V.

Elaine A. LORD, Superintendent, Bedford Hills Correctional Facility,
Respondent.

No. 99 Civ. 4874(JGK).

Jan. 9, 2001.

Myron Beldock, Jaya L. Connors, for the petitioner. Mary C. Farrington, Ada, for the respondent.

KOELTL, J.

OPINION AND ORDER

*1 Petitioner Juanita Cotto seeks a writ of habeas corpus pursuant to 28 U.S.C. 2254. It is undisputed that on the evening of February *15,* 1987, the petitioner, known as "Jennie" Cotto, stabbed her 79-year old grandmother, Emilia Oyola. numerous times. The petitioner ransacked the

apartment and fled. Her grandmother made her way to a neighbor's apartment where she said "Jeimie did it." Emilia Oyola subsequently died from the wounds the petitioner inflicted.

At her trial in New York State Supreme Court, New York County, the petitioner raised the defense of extreme emotional disturbance, but that defense was supported only by testimony from the petitioner and testimony that defense counsel was able to elicit on the cross-examination of the petitioner's mother. The petitioner was convicted ofmurder in the second degree and was sentenced to an indeterminate prison term of sixteen years to life, which she is currently serving.

Years after her conviction, assisted by new counsel, the petitioner now argues that she had been the victim of extreme abuse in her grandmother's home and that this abuse would have supported her defense of extreme emotional disturbance. More specifically, the petitioner argues that she was denied the effective of assistance of counsel because her trial attorney: (1) failed to consult with, and call as a withess, a psychiatrist who had interviewed the petitioner in support of the petitioner's defense of extreme emotional disturbance; (2) did not otherwise adequately investigate and develop the facts underlying the extreme emotional disturbance defense at trial; and (3) committed other errors, such as failing to request that the jury be instructed on the defense of intoxication. [FN1]

> The petitioner also alleged in her habeas petition that her trial counsel was ineffective for failing to communicate a plea offer to the petitioner. The respondent denied that any plea offer was made to the petitioner's trial counsel. The trial court rejected this claim on the petitioner's motion pursuant to C.P.L. 440.10 to vacate the judgment of conviction, finding

> that: "[T]here is no basis for finding that counsel failed to communicate a plea offer." *People v. Cotto,* Indict. No. 1258- 87, at 5 (N.Y.Sup.Ct. August 7, 1997). The Appellate Division affirmed the order denying the C.P.L. 440.10 motion. *People v. Cotto,* 687 N.Y.S.2d 85 (App.Div.1999). On this petition, the two assistant district attorneys who appeared in connection with the petitioner's case affirmed that there had been no plea offer other than the opportunity to plead to the Indictment. (Affirmation of Patricia Nunez, sworn to July 10, 2000, ¶J 2-4; Affirmation of Thomas Schiels, sworn to July 11, 2000, ¶f 2-3.) At oral argument, the petitioner's counsel conceded that the petitioner had not established by a preponderance of the evidence that a plea offer was made. (Transcript of Oral Argument dated September 7, 2000 ("Arg.") at 21- 23.) It cannot be said that the decision of the state trial court was based on "an unreasonable interpretation of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. 2254(d)(1), and no evidence was presented in this Court that undermines the state court's conclusion in any way. Therefore, any claim based on an alleged failure to communicate a plea offer is denied.

For the reasons that follow, the petition for habeas corpus is denied.

I.

The records submitted in connection with the present application, including the record on appeal submitted in connection with the petiioner's collateral challenge to her conviction, discloses the following facts. Until December, 1986, the petitioner, who was also known as "Jennie," her young daughter, Emily, her mother, Mercedes Maldonado,

and her uncle, Jose Maldonado, lived with her maternal grandmother, Emilia Oyola ("Oyola"), in Oyola's third-floor apartment at 434 East 105th Street inManhattan. (Record onAppeal("R.")at 325-332, 346-350, 366-369.) In December 1986, the petitioner, Emily and Mercedes Maldonado moved to an apartmentat319 East 102nd Street. (R. at 326- 327.)

On the evening of February 15, 1987, the petitioner went to Oyola's apartment and, after a period of time in which they drank rum together, the petitioner stabbed Oyola multiple times with a knife in the victim's neck, face, head, and back. (R. at 216-218, 289, 313, 319, 481-486, 518-519.) The petitioner then threw the knife in the kitchen sink, ransacked the bedrooms, and left Oyola bleeding on the floor. (R. at 301-302, 523-525.) At about 8:00 p.m. that evening, Ramon Carrion ("Carrion") was in his grandmother's apartment on the fourth floor of Oyola's apartment building when he heard a knock on the door. (R. at 401.) When Carrion opened the door, he saw Oyola covered with blood. (R. at 40 1-402.) Oyola said, "I'm dying, I'm dying, please help me." (R. at 402.) Carrion carried Oyola inside and placed her in a chair. (R. at 402.) When Carrion asked Oyola what had happened, Oyola responded twice that "My granddaughter, Jennie, did it...." (R. at 403.) Carrion then telephoned for the police and an ambulance. (R. at 403.)

*2 At about 8:30 p.m., Officer Edward Lutz ("Officer Lutz") arri·ed at the scene and saw Oyola covered with blood. (R. at 29[illegible]300.) After calling an ambulance, Officer Lutz went to Oyola's apartment. (R. at 300.) Inside the apartment, he observed a puddle of blood in the kitchen and a larger puddle of blood in the living room. (R. at 301.) Officer Lutz observed that the back bedrooms were in disarray and that the dresser drawers had been pulled out. (R. at 301.) After crime scene officers arrived, Officer Lutz discovered a bloodied kitchen knife with an eight-inch blade in the kitchen sink. (Rat 302-303.)

When paramedics arrived, Oyola was in critical condition. (R. at 31 -313.) The paramedics brought Oyola to Metropolitan Hospital, where she died several hours later. (R. at 314, 323-324.) Sometime after 11:00 p.m. on February 15, 1987, Detective Angelo Cioffe ("Detective Cioffe") interviewed the petitioner at the police precinct. (R. at 406.) At about 8:20 a.m. on February 16, 1987, Detective Cioffe drafted a statement which the petitioner read and signed. (R. at 407, 410-414, 426-427.) Tn that statement, the petitioner admitted visiting her grandmother several times on February 15, 1987. However, the petitioner stated that she left her grandmother's apartment at about 6:30 p.m. that evening and did not mention any involvement in the stabbing. (R. at 410-414.) That same afternoon, the petitioner gave a videotaped statement to an assistant district attorney in which she denied any involvement in Oyola's murder. (Transcript of Videotaped Statement, dated February 16, 1987, ("February Videotape Tr."), at 8 0-82.) Shortly thereafter, the petitioner was arrested. (R. at 415.)

On March31, 1987, accompanied by trial counsel, the petitioner gave a second videotaped statement to the same assistant district attorney during which she stated that her former boyfriend, Miguel DeJesus ("DeJesus"), had come to Oyola's apartment looking for money and, in the petitioner's presence, grabbed Oyola and stabbed her in the neck. (Transcript of Videotaped Statement, dated March 31, 1987, ("March Videotape Tr."), at *4-5,* 31-36.) The petitioner also stated that DeJesus had threatened to kill her mother and her daughter if the petitioner told of his involvement in the crime. (March Videotape Tr. at 5, 32.) DeJesus, however, had been arrested for drug possession on February 13, 1987, two days before Oyola's death, (R. at 44 1-444) and was not released from custody until February 16, 1987, the day after the murder. (R. at *450-452.)* After learning that DeJesus had been in jail at the time of Oyola's death, the petitioner decided to admit her involvement in Oyola's murder. (R. at *534-535.)*

At trial, the petitioner's trial counsel told the jury in his opening statement that he would show, through the testimony of his client and others, that the petitioner acted under extreme emotional disturbance. (R. at 289-291.) On cross-examination of the petitioner's mother, Mercedes Maldonado, the petitioner's trial counsel elicited testimony that Oyola drank everyday; that she would start arguing with Mercedes Maldonado and Maldonado's daughters when she was drunk; and that Oyola would curse at them. (R. at 347-351.) Mercedes Maldonado also testified on cross-examination that Oyola would misplace her bag when drunk and would accuse the petitioner and her daughter of stealing money, but would later find it and apologize. (R. at 349-3 50.)

*3 The petitioner testified that when Oyola drank she would start cursing and fighting with the petitioner and make accusations. (R. at 496-497.) During the period of time that the petitioner, her daughter, and Mercedes Maldonado lived with Oyola, Oyola would on occasion throw them out of the apartment, forcing them to sleep elsewhere. (R. at 496-497.) The petitioner also testified that Oyola often accused her and her daughter of stealing, although they had not stolen anything and Oyola would later find the item and apologize. (R. at 497.) The petitioner stated that she would ignore Oyola and "was the only in one the family that could even deal with it." (R. at 498.)

With respect to February 15, 1987, the petitioner testified that she had gone to her grandmother's apartment three or four times that day. (R. at 482.) On the last occasion, the petitioner and Oyola were drinking rum. (R. at 483.) Although the petitioner was slightly drunk, Oyola was drunk. (R. at 483, 502.) The petitioner testified that Oyola kept cursing at her and arguing with her. (R. at 481, 485, 518.) Oyola also cursed the petitioner's daughter, Emily. (R. at

485.) The petitioner testified that Oyola "was telling us to go to Hell for me, my daughter, and she sa[id] she hoped they take my daughter and split her in two, ... that [Emily]'s a thief." (R. at 482.) At first the petitioner ignored Oyola, but the petitioner testified that at some point "I just went off. Exactly what she told me that I went off, I don't remember." (R. at 485.) The petitioner testified that, without any awareness of throwing her grandmother to the floor or stabbing her, the petitioner found herself on top of Oyola holding a knife in her hand. (R. at 481-482, 484-486, 502-503, 518- 519.)

The petitioner testified that when she saw her grandmother bleeding and realized what had happened she became upset and scared. (R. at 486-487, 523.) She threw the knife in the kitchen sink and ransacked the bedroom to make it look like a robbery had occurred. (R. at 487-488, 523-525.) The petitioner testified that she did not take anything from the apartment and that she then fled home. (R. 487-488.) The petitioner testified that she denied stabbing the petitioner to the police and the assistant district attorney because she was scared. (R. at 49 1-492.) She implicated DeJesus in the killing on the advice of other inmates at Riker's Island. (R. at 493-494.)

Although the assistant district attorney made reference to a psychiatrist, Dr. Naomi Goldstein ("Dr.Goldstein"), who had interviewed the petitioner, trial counsel did not call any other defense witnesses. (R. at 501, 541-543.) Before summations, trial counsel successfully moved to dismiss a felony murder charge on the grounds that there was insufficient evidence to submit to the jury that a robbery had occurred. (R. at 545-546.)

On November 17, 1987, the jury found the petitioner guilty of murder in the second degree. (R. at 649-652.) On December 11, 1987 the petitioner was sentenced to an

indeterminate prison term of sixteen years to life. (R. at 662.) The Appellate Division, First Department, affirmed the petitioner's conviction on March22, 1990. *See* People v. Cotto, 552 N.Y.S.2d 639 (App.Div.1990). The New York Court of Appeals denied the petitioner's leave to appeal on June 27, 1990. *See* People v. Cotto, 559 N.E.2d 685 (N.Y. 1990).

*4 On April 18, 1997, the petitioner sought collateral relief in state court by filing a motion in the Supreme Court, New York County, to vacate her conviction pursuant to N.Y. C.P.L. § 440.10 on the grounds that she had been denied the effective representation of counsel at trial and that trial counsel failed to communicate a plea offer to her, On August 7, 1997, the trial judge, Justice Herbert Altman, of the New York State Supreme Court, New York County, denied the petitioner's motion without a hearing, finding that trial counsel had adequately represented the petitioner and that there was no basis to conclude that trial counsel failed to communicate a plea offer. *See People v. Cotto,* Indict. No. 1258-87 (N.Y.Sup.Ct. August 7, 1997); *(see also* R. at 11-21.). The Appellate Division, First Department, affirmed the denial of the motion on March 4, 1999, concluding that "[ejach of trial counsel's alleged deficiencies in his conduct of defendant's extreme emotional disturbance defense had a plausible strategic explanation, and, in any event, these deficiencies could not have deprived defendant of a fair trial." People v. Cotto. 687 N.Y.S.2d 85, 86 (App.Div.1999) (citation omitted). The New York Court of Appeals denied the petitioner's application for leave to appeal on July 6, 1999. *See People v. Cotto,* 695 N.E.2d 1085 (N.Y.1999).

The petitioner filed her petition for a writ of habeas corpus on July 7, 1999. This Court held an evidentiary hearing on July 13-14, 2000. At the hearing Dr. Goldstein, the petitioner, and her sister, Maria Cotto, testified. Dr. Goldstein testified concerning her interview of the petitioner, her written report

that she sent to trial counsel, what she would have done had trial counsel contacted her about the written report, and what she would have testified to with respect to the defense of extreme emotional disturbance had she been called as a witness. (Transcripts of Evidentiary Hearing, dated July 13-14, 2000, ("Hr.") at 5-148.) The petitioner testffied about trial counsel's representation of her, Oyola's past abusive behavior, the events surrounding Oyola's death, and the petitioner's subsequent arrest and trial. (Hr. at 158- 266.) Maria Cotto testified about her relationship with the petitioner, her family circumstances, including instances of abuse on the part of Oyola, and that she had been willing to help the petitioner at trial had she been asked. (266-338.) The evidence adduced at the evidentiary hearing is recounted at greater length below in connection with the petitioner's specific claims of ineffective assistance of trial counsel.

II.

This case is governed by the habeas statute as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") because the petitioner filed her petition after AEDPA's effective date. *See* Lindh v. Murphy, 521 U.S. 320, 326-327 (1997). AEDPA, which became effective on April 24, 1996, imposed a one-year statute of limitations for the filing of a federal habeas corpus petition seeking relief from a state court conviction. *See* 28 U.S.C. 2244(d)(l). In general, this one-year period runs from the date on which the state criminal judgment becomes fmal. *See id.* However, U:S.C. 2244(d)(2), as amended by AEDPA, provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation...." 28 U.S.C. 2244(d)(2).

*5 In Ross v. Artuz. 150 F.3d 97, 103 (2d Cir.1998'), the Court of Appeals for the Second Circuit held that petitions

for habeas corpus pursuant to 28 U.S.C. 2254 brought by petitioners whose convictions had become final prior to the effective date of AEDPA are timely under AEDPA if filed on or before April 24, 1997. *See* Ross. 150 F.3d at 103. In this case, the petitioner filed her N.Y. C.P.L. § 440.10 motion on April 18, 1997 and filed her habeas petition on July 7, 1999. The respondent initially raised the defense that the petition was untimely, arguing that the one-year grace period imposed by the Court of Appeals for the Second Circuit in *Ross* is not tolled under 28 U.S.C. 2244(d)(2) by the pendency of a post-conviction state court collateral proceeding. However, in *Bennett v. Artuz,* 199 F.3d 116 (2d Cir.1999), *affd on other grounds,* No. 99-1238, 2000 WL 1663653 (U.S. Nov. 7, 2000), the Court of Appeals for the Second Circuit rejected a similar argument, holding that Section 2244(d)(2) applies to a petition challenging a pre-AEDPA conviction and that a properly filed application for state post-conviction relief can toll the one-year grace period established in *Ross. See* Bennett, 199 F.3d at I 19 *see also* Duncan v. Griener, No. 97 Civ. 8754, 1999 WL 20890, at *3 (S.D.N.Y. Jan. 19, 1999).

In this case, the grace period under *Ross* ran from April 24, 1996 to April 18, 1997, when the petitioner's post-conviction motion was properly filed in state court--a total of359 days. It was then tolled from April 18, 1997 until June 6, 1999, the date the New York Court of Appeals denied the petitioner's application for leave to appeal. The petitioner promptly filed her habeas petition the next day, June 7, 1999. As a result, the petitioner's habeas petition was filed within the one-year provided for in *Ross* and is timely.

III.

The respondent has moved to dismiss this petition pursuant to Rule 9(a) of the Rules Governing Section 2254 Cases in the United States Courts. Rule 9(a) provides:

> Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise ofreasonable diligence before the circumstances prejudicial to the state occurred.

Rule 9(a) of the Rules Governing Section 2254 Cases. Rule 9(a) is not a statute of limitations, but is based on the equitable doctrine of laches. *See* Rules Governing Section 2254 eases Rule 9(a) Advisory Committee Notes (1976) ("Advisory Committee Notes"); *see also Norris v. Lefèvre,* No. 82 Civ. 0614, 1982 WL 31 07,*3 (S.D.N.Y. Aug. 27, 1982). The fact that a petition is not time-barred by the statute of limitations imposed by AEDPA does not preclude dismissal of the petition pursuant to Rule 9(a). *See Ross,* 150 F.3d at 103. Rule 9(a) "is permissive rather than mandatory, allowing a district court to exercise discretion to entertain an application, even where the state has made the required showing of delay and prejudice." *Rosa v. Senkowski,* No. 97 Civ. 2468, 1997 WL 436484, at *11 (S.D.N.Y. Aug. 1, 1997) (citing Advisory Committee Notes), *rnodfled,* 1997 WL 724559 (S.D.N.Y. Nov. 19, 1997), *affdon other grounds,* 148 F.3d 134 (2d Cir. 1998) (per curiam); *J-fughes v. Irvin,* 967 F.Supp. 775, 779 (E.D.N.Y. 1997).

*6 Rule 9(a) has been narrowly construed and a respondent seeking dismissal of a habeas petition under the rule faces a "heavy burden ." *Walters v. Scott,* 21 F.3d 683, 686 (5th Cir. 1994) *see also Rosa,* 1997 WL 436484, at * 11; *Hughes,* 967 F.Supp. at 779. A respondent must: (1) make a particularized showing of prejudice; (2) show that the prejudice resulted from the petitioner's delay in filing a petition; and (3) show that the petitioner has not acted with reasonable diligence. *See Walters,* 21 F.3d at 686-87; *Hughes,* 967 F.Supp. at 222i

see alsoRosa, 1997 WL436484, at *11; *Hodgev. Walker,* No. 95 Civ. 2873. 1996 WE 363181, at *2 (S.D.N.Y. Jul. 1, 1996), *adopted by,* 1996 WL 591247 (S.D.N.Y. Oct. 11, 1996). For purposes of Rule 9(a), prejudice cannot be presumed solely from the petitioner's delay alone. *See* Rosa, 1997 WL 436484. at *11 *(citingMoselevv. Scully,* 908 F.Supp. 1120, 1130 (E.D.N.Y.l995), *affd,* 104 F.3d 356 (2d Cir.l996). [FN21]

> FN2. In fact, before passing Rule 9(a), Congress specifically deleted a provision from the draft version that would have created a rebuttable presumption of prejudice after a delay of five or more years, concluding that such a presumption would be inconsistent with the equitable purposes of habeas corpus relief. SeeAct of Sept. 28, 1976, Pub.L. No.94-426, 2(9). 90 Stat. 1334; *see also* H.R.Rep. No. 94-1471 p. 5 (1976), U.S.Code Cong. & Admin. News 1976, pp. 2478, 2481; *Lonchar v. Thomas,* 517 U.S. 314. 327 (1996).

The respondent alleges that the respondent has been prejudiced in defending against the petition by the petitioner's delay in filing because trial counsel is now deceased, Dr. Goldstein no longer has an intact file and has no current recollection of her evaluation of the petitioner, and other material evidence, such as trial counsel's records, are unavailable. [FN3] Where a petitioner asserts an ineffective assistance of counsel claim, the testimony of the attorney alleged to have rendered ineffective assistance is relevant and the death of that attorney may result in prejudice. *See, e g.Hodge,* 1996 WL 363181, at *3 The Advisory Committee's Notes on Rule 9(a) observe that:

> The parties dispute the actual length of the petitioner's delay for purposes of Rule 9(a). The respondent argues that the petitioner delayed ten years

> after her conviction to raise her claims in the state collateral proceeding. (Resp.'s Supp. Mem. Of Law at 3.) On the other hand, the petitioner argues that the delay was either seven or five years depending on whether the time should be measured up to the time that the petitioner brought a clemency petition or up to the time that the petitioner filed her section 440.10 motion. (Beldock Affirmation, dated June 26 2000 ("June BeldockAff."), atf 16.) Inthis case, it is clear that there was a delay of at least five years and the exact length ofthe delay is not dispositive.

The grounds most often troublesome to the courts are ineffective counsel [and four other enumerated grounds.] ... When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little if no recollection as to what took place and that many of the participants in the trial are dead.... As a consequence, there is obvious difficulty in investigating petitioner's allegations. Advisory Committee Notes. "Prejudice to the state may not merely be presumed, however, from the absence of a transcript or of witnesses necessary to recount the details of[a] proceeding." Norris, 1982 WL 3107. at *4• The respondent "must actually be disadvantaged by the absence of such resources in responding to the particular allegations or theories asserted by [thel petitioner as grounds for habeas corpus." *Id.; see also* Rosa, 1997 WL 436484, at *11.

The respondent has not shown that the respondent was actually disadvantaged or that any such prejudice was caused by the petitioner's unreasonable delay. First, as reflected in the quality of the respondent's papers, the respondent has been able to respond effectively to the allegations and theories asserted by the petitioner. Although ineffective assistance claims often rest on events that occur outside of

the trial, the respondent has complete copies ofthe trial record, the record on appeal of the petitioner's state court collateral claim, Dr. Goldstein's report, and other material relied on by the petitioner in asserting her claims. In addition, when trial counsel was contacted about the petitioner's case in 1993, three years after the end of the petitioner's direct appeal, trial counsel did not remember much about the case and had already thrown out all his files, (Beldock Affirmation, dated June 262000 ("June BeldockAff."), at ¶ 7), and it is not clear that his testimony would have been helpful to the respondent if this petition had been filed prior to his death.

*7 In some respects, the petitioner's delay in filing her petition prejudiced her, rather than the respondent. Testimony from her mother, now deceased, regarding instances of Oyol&s abusive and violent conduct and her mother's recollection of interactions with trial counsel is unavailable to the petitioner. Testimony from trial counsel or evidence from his records is also unavailable and thus the petitioner's allegations about her interaction with her trial counsel are largely uncorroborated. Dr. Goldstein's memory has faded, her testimony is reconstructed from her notes, and her testimony is speculative and relies, in part, on information she has learned only in recent years, thereby affecting her credibility. Thus, the respondent has not satisfied its burden of demonstrating prejudice from the petitioner's delay in pursuing her collateral remedies sufficient to warrant the exercise of the Court's discretion to dismiss the petition.

In any event, it cannot be said that, under the circumstances, the petitioner has not been diligent with respect to her case. After the conclusion of her direct appeal in 1990, the petitioner had no legal assistance and was acting pro se for a number ofyears. She had no court papers other than the appeal brief submitted on her behalf by Legal Aid. (Hr. at 172.) At some point, a law intern from the Steps to End

Violence program attempted to assist the petitioner in getting her trial minutes, along with other court papers, but, he gave up after he was unsuccessful. (Hr. at 176.) In 1993, the petitioner again unsuccessfully attempted to obtain her trial minutes. (Hr. at 172, 176.) In 1993, the Albany Law School Domestic Violence Clinic ("Clinic") began to investigate her case and made diligent attempts to acquire infonnation regarding trial counsel's representation of the petitioner. (June Beldock AlE at ¶f 6-8, 11.) The Clinic filed an application to the Governor to commute the petitioner's sentence in 1995. (June Beldock Aff. at ¶ 11, Ex. B.) In addition, since becoming involved in this matter in April 1997, the petitioner's present counsel has diligently pursued her claims by initiating state collateral proceedings and filing this petition. (June Beldock Aff. at ¶ 6.) Therefore, the respondent's motion to dismiss the petition pursuant to Rule 9(a) is denied.

IV.

A federal court may only grant a petition for habeas corpus challenging a state court judgment on a claim adjudicated on the merits by the state court if the adjudication of the claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d) *see also* *Williams v. Taylor,* 120 S.Ct. 1495, 15 19-1522 (2000) (O'Connor, J., writing for the Court in Part II of her opinion).

*8 A state court decision is "contrary to" clearly established law within the meaning of 2254(d)(l) if: (1) "the state court applies a rule that contradicts the governing law set forth" in the relevant Supreme Court precedents, or (2) "the state court confronts a set of facts that are materially indistinguishable

from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court] precedent." *Williams*, 120 S.Ct. at 1519-20. A state court decision involves an "unreasonable application of" clearly established federal law if the state court's application of Supreme Court precedent to the facts of the case is "objectively unreasonable." *Id.* at 1521. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 1522. Thus, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* Some increment of incorrectness beyond error is required, but "the increment need not be great...." *Francis v. Stone*, 221 F.3d 100, 111 (2d Cir.2000). The increment need not be so great as to limit habeas relief to those state court decisions "so far off the mark as to suggest judicial incompetence." *Id.* (citation omitted); *see also Jones v. Stinson*, 229 F.3d 112, 119 (2d Cir.2000).

V.

The petitioner argues that she was denied the effective of assistance of counsel because her trial attorney: (1) failed to consult with, and call as a witness, Dr. Goldstein, to support the petitioner's defense ofextreme emotional disturbance; [FN41 (2) did not adequately investigate and develop the facts underlying an extreme emotional disturbance defense at trial; and (3) committed other errors which constituted ineffective assistance.

> FN4. Under New York law, "extreme emotional disturbance for which there was a reasonable explanation or excuse" is an affirmative defense to murder in the second degree, and if established, has the effect of reducing the maximum charge to first-

> degree manslaughter. *See* N.Y. Penal Law 125.25(1)(a). The "reasonableness" of the explanation or excuse "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." *Id.*

To succeed on a petition for habeas corpus based upon ineffective assistance ofcounsel, a petitioner must show both that (1) her counsel's performance was deficient in that it was objectively unreasonable under professional standards prevailing at the time, and (2) that counsel's deficient performance was prejudicial to the petitioner's case. *See, e.g., Strickiandv. Washington,* 466 U.S. 668, 687 (1984); *Bunkley v. Meachuni,* 68 F.3d 1518, 1521 (2d Cir. 1995); *Ni eves v. Slate ofNew York,* No. 97 Civ. 2121, 1998 WL 599716, at *3 (S.D.N.Y. Sept. 10, 1998). However, "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland,* 466 U.S. at *697.*

A petitioner cannot meet the first prong of the *Strickland* test merely by showing that her counsel employed a poor strategy or made a wrong decision. *l',Tieves,* 1998 'WL *599716,* at *3 Instead, the petitioner must establish that her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Strickland,* 466 U.S. at 687. Indeed, there is a "strong presumption" that counsel's conduct fell within the broad spectrum of reasonable professional assistance, and a defendant bears the burden of proving "that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Ki,nmelrnan v. Morrison,* 477 U.S. 365. 381 (1985) *(citingStrickland,* 466 U.S. at 688-89).

*9 To satisfy the second prong of *Strickland,* the petitioner must show that "[t]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland.* 466 U.S. at 694. In this case, the petitioner's ineffective assistance of counsel claims fail to meet the first prong of the *Strickland* test.

A.

The petitioner first claims that it was ineffective assistance of counsel not to call at trial Dr. Goldstein, a distinguished and well respected expert psychiatrist, to pursue with her the defense of extreme emotional distress. Dr. Goldstein, who had been contacted by trial counsel to examine the petitioner as to her competency and general mental state, met with the petitioner twice before trial for a total of about two and one-half hours. (Pet.'s Ex. 5 at 1.) She also reviewed various case records, including the videotaped statements made by the petitioner, and consulted by telephone with a social worker to whom the family had been referred. (Pet.'s Ex. 5 at 1.)

After completing her evaluation, Dr. Goldstein prepared a written report dated September 2, 1987, which she sent to trial counsel. (Pet.'s Ex. 5.) The report reviewed the relevant information about the petitioner's past that had been disclosed to her. (Pet.'s Ex. 5 at 1-4.) The report provides descriptions of Oyola, "which [had] emerged from several sources" indicating that she was "a difficult woman ... who could be physically abusive" and "drank heavily." (Pet.'s Ex. 5 at 3.) The petitioner and her daughter, Emily, were apparently the principal objects of Oyola's hostility. (Pet.'s Ex. 5 at 3.) The report also indicated that the petitioner occasionally took drugs, principally crack. (Pet.'s Ex. 5 at 3.)

In describing the events of February 15, 1987, the petitioner told Dr. Goldstein that she was upset because her grandmother was "'nagging and nagging." (Pet.'s Ex. 5 at 4.) The petitioner stated that she loved Oyola very much, although Oyola sometimes did cruel things. (Pet.'s Ex. 5 at 4.) The petitioner told Dr. Goldstein that she did not recall exactly what happened and that she just"'went off." '(Pet.'s Ex. 5 at 4.) With respect to the petitioner's willingness to provide information, the report states:

> It is noteworthy that Ms. Cotto had been enormously reluctant to acknowledge or discuss the charges against her and had not discussed with any consistency what may have transpired. When I last saw her she stated that she was prepared to talk about it to the extent that she could remember, because it had, "been eating at my mind." She was ashamed to tell anyone what had happened, even counselors at Rikers Island. (Pet.'s Ex. 5 at 4.)

Dr. Goldstein diagnosed the petitioner as having a personality disorder and an adjustment disorder with depression. (Pet.'s Ex. 5 at 5.) Dr. Goldstein opined that the petitioner was competent to stand trial and found no evidence to support an insanity defense. (Pet.'s Ex. 5 at *5.)* She noted that lacking more information it was difficult to visualize exactly what transpired between Oyola and the petitioner leading up to Oyola's death. (Pet.'s Ex. 5 at 5.) She concluded: "I think that the possibility of extreme emotional disturbance would have to be considered along with the likelihood that the incident was the culmination of long standing family tensions. The validity of the arguments and the source of the original provocation are difficult to assess." (Pet.'s Ex. 5 at 6.) Dr. Goldstein was not called by trial counsel to testify at the petitioner's trial.

*10 Dr. Goldstein submitted an affidavit in support of the petitioner's N.Y. C.P.L. § 440.10 motion and this petition. (Affidavit of Naomi Goldstein, sworn to April 17, 1997, Pet.'s Ex. 6 .)Accordingto Dr. Goldstein, her records indicated that she never heard from trial counsel after submitting her written report and that it was unusual that she was not contacted. (Pet.'s Ex. 6 at ¶f 18-19.) Dr. Goldstein also indicated that she would have been willing to testify for the defense as to her fmdings in evaluating the petitioner. (Pet.'s Ex. 6 at 20.)

At the evidentiary hearing, Dr. Goldstein testified that trial counsel asked her to examine the petitioner's mental competency and whether a mental defense was available. (Hr. at 17.) According to Dr. Goldstein, trial counsel was "very distraught" and was "trying to figure out what did happen ... and was concerned about the lying." (Hr. at 22, 78, 80-8 1.) There was no limitation place on how many times or how long Dr. Goldstein could meet with the petitioner. (Hr. at 68-70.) Dr. Goldstein had no independent recollection of interviewing the petitioner and testified based on her notes, her report, and her experience. (Hr. at 63-64.) Dr. Goldstein testified that she might have spoken to trial counsel prior to sending her report and that this would be her practice, although she had no record of such a conversation in her notes. (Hr. at 21, 92.) She also testified that she had no notes indicating that trial counsel had contacted her after receiving her report, and she therefore concluded that trial counsel did not call her after receiving the report. (Hr. at 17-18, 20.) Dr. Goldstein testified that had trial counsel called her after receiving the report, she would have "been adamant" that she needed to see the petitioner again and she would have asked to see members of the family. (Hr. at 24.) Dr. Goldstein, however, did not mention the need for further meetings with the petitioner or family interviews in her report and did not follow up with trial counsel after submitting the report. (Hr. at 84, 104, 129).

Dr. Goldstein testified that the petitioner "was extremely emotional [sic] disturbed" and that Dr. Goldstein would have testified in support of an extreme emotional disturbance defense. (Hr. at 26-27.) Dr. Goldstein opined that the petitioner must have perceived herself to be threatened in an intolerable way and that she was overcome by rage causing her to lose control. (Hr. at 40,43, 57, 93.) Dr. Goldstein admitted that this opinion of the petitioner's mental state, however, is not contained in her notes or her report. (Hr. at 134-136.) Although Dr. Goldstein was aware that the petitioner had made two prior false statements to the police and an assistant district attorney and she was also aware of trial counsel's concern about the petitioner's credibility, Dr. Goldstein testified that she credited the information provided to her at the time by the petitioner. (Hr. at 41, 82, 103, 112-113.)

*11 In connection with her affidavit and testimony, Dr. Goldstein reviewed affidavits, (Pet.'s Exs. 9 & 10), submitted by the petitioner and Maria Cotto. (Hr. at 49.) These affidavits detail a history of abuse suffered by the petitioner and other family members at the hands of Oyola and others. (Pet.'s Ex. 9 at ¶f 4-31, 34-35; Pet.'s Ex. 10 at ¶f 7-17, 23-24.) The petitioner's affidavit, for example, detailed a history of physical and psychological abuse by her mother and grandmother, and also explained how she had been sexually abused as a child by men who visited her grandmother. (Pet's Ex. 9 at ¶ 4- 31.)

When Dr. Goldstein interviewed the petitioner, Dr. Goldstein did not learn about the instances of child abuse contained in the affidavits and did not ask the petitioner about child abuse, but she testified that had she continued to obtain information she would have expanded her inquiry to include the petitioner's experiences as a child. (Hr. at *55-56.)* Had Dr. Goldstein known of the expanded history of abuse contained in the affidavits, "it would have bolstered [her] conviction

that [the petitioner] was psychiatrically, psychologically very damaged." (Hr. at *58.)* Dr. Goldstein noted that some of the petitioner's "secrets remained secret for many years until she could cope with them and talk about them" and that the history of abuse related in the affidavits could have taken months to develop. (Hr. at 53-54, 118.) Dr. Goldstein observed that the petitioner "was reluctant to say even more nasty things about her grandma."(Hr. at 132.)

Dr. Goldstein admitted that trial counsel may not have called her as a witness because he did not think her report was clear enough or was disappointed with the report. (Hr. at 129.) She acknowledged that had she been called to testify, she would have been cross-examined about the petitioner's credibility and drug use. (Hr. at 129-131.)

The petitioner testified at the evidentiary hearing that she was comfortable being questioned by Dr. Goldstein and that she would most likely have continued to give Dr. Goldstein information if she had seen the doctor again. (Hr. at 170-171, 230.) The petitioner, however, only gave Dr. Goldstein "a taste of the violence that went on in [her] family" and testified that she "probably wasn't ready at the time to give [Dr. Goldstein] more" and that she needed years of therapy "to be able to speak up now with everything [she] went through as a child." (Hr. at 217, 250.) The petitioner did not tell Dr. Goldstein about her sexual abuse because she was not consciously aware of it at the time and did not speak about that until years later, afier counseling. (Hr. at 231, *245,257-258.)* The petitioner testified thattrial counsel had told the petitioner that Dr. Goldstein would testify on her behalf, however, when questioned why Dr. Goldstein did not testify at the end of the trial, trial counsel allegedly told the petitioner that either Dr. Goldstein was unavailable or that "we don't need her." (Hr. at 170,210.)

*12 The petitioner asserts that the failure to follow up with Dr. Goldstein concerning the evaluation in her report and the failure to provide the jury with the testimony that would have come from Dr. Goldstein's expert psychiatric testimony was not a reasonable strategic decision by trial counsel and was an objectively unreasonable breach of permissible standards for trial counsel that prejudiced the defense.

Trial counsel's decision "whether to call specific witnesses--even ones that might offer exculpatory evidence--is ordinarily not viewed as a lapse in professional representation." *United States v. Schmidt,* 105 F.3d 82. 90 (2d Cir.1997) *see also* *United Slates v. Best,* 219 F.3d 192, 201 (2d Cir.2000) (citing *Schmidt,* 105 F.3d at 90'); *United Slates v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.")

In the present case, the petitioner has not shown that the failure to call Dr. Goldstein as a witness fell below an objective standard of reasonableness. Expert psychiatric testimony is not required to establish the defense of extreme emotional disturbance. *See e.g., Peoplev. Move,* 489 N.E.2d 736, 738 (N.Y.1985) *see also* *DeLuca v. Lord,* 77 F.3d 578, 586 (2d Cir.1996). The petitioner has not demonstrated that the testimony that Dr. Goldstein would have given in 1987 would have materially benefited the petitioner. As the state trial court determined in reviewing the petitioner's motion to vacate her conviction, Dr. Goldstein's conclusion that "the *possibility* of extreme emotional disturbance would have to be considered along with the *likelihoodthat* the incident was the culmination of long standing family tensions," (Pet.'s Ex. 5 at 6) (emphasis added), was "equivocal and of questionable persuasiveness." (R. at 16.) The report did not indicate the strong positions stated by Dr. Goldstein at the evidentiary

hearing that the petitioner was extremely emotionally disturbed and that Dr. Goldstein would testify in support of the defense; the report made no mention of the need for further meetings with the petitioner or family interviews; and it did not indicate that Dr. Goldstein stronglybelievedtrial counsel should follow up with her further about developing an extreme emotional disturbance defense. Indeed, had Dr. Goldstein been called to testify as a trial witness, she would surely have been cross-examined with the conclusion in her report that: "The validity of the arguments and the source of the original provocation are difficult to assess." (Pet.'s Ex. 5 at 6.)

The petitioner has not established that trial counsel did not follow up with Dr. Goldstein. Dr. Goldstein had no independent recollection of interviewing the petitioner and she relied on her notes, her report, and her experience in preparing her affidavits and testifying at the evidentiary hearing. Although Dr. Goldstein's records indicated that she never heard from trial counsel again after submitting her report, leading her to conclude that trial counsel did not contact her again, Dr. Goldstein assumed that she spoke with trial counsel before sending out her report because it was her custom to do so, despite the fact that her records do not indicate that any such conversation took place. If Dr. Goldstein did not make any written record of a pre-report conversation that she assumes took place, it cannot be inferred that a post-report conversation did not take place from the absence of a written record.

*13 Dr. Goldstein recognized that trial counsel may not have called her as a witness because there were reasons that he might have concluded that the report was not clear enough or that he might have been disappointed with the report. For example, trial counsel had legitimate concerns about the petitioner's credibility and calling Dr. Goldstein would have permitted cross-examination on that issue, along with the

issue of the petitioner's drug use. The report itself indicates that Dr. Goldstein's evaluation was hampered by the petitioner's lack of memory about details of the killing. After the petitioner saw Dr. Goldstein, trial counsel took the extraordinary step of having the petitioner seen by a hypnotist to assist in recovering the petitioner's memory without success. (Hr. at 178-179, 232-233.) Trial counsel may reasonably have concluded that given the equivocal nature of the evaluation and the failed attempt to recover the petitioner's memory of events even after hypnosis, Dr. Goldstein would not have been able to assist the defense because such testimony would further highlight the inconsistencies in the petitioner's account of events.

In addition, as the state trial court noted, it is not clear that had Dr. Goldstein continued to speak with the petitioner, the petitioner would have revealed more details about the history of abuse she suffered. (R. at 16.) Dr. Goldstein testified that the history of abuse that the petitioner suffered could have taken months to develop and that it took the petitioner years to be able to cope and discuss some of her "secrets." (Hr. at *5 3-54,* 118.) The petitioner herself acknowledged that she probably was not ready to reveal more information about instances of abuse and was not yet aware of the sexual abuse. Dr. Goldstein could have spent additional time with the petitioner to obtain more information, but chose not to. The report itself discussed the petitioner's reluctance to discuss what had happened. Thus, trial counsel could reasonably have concluded that further evaluation would not reveal additional pertinent information.

Dr. Goldstein's current view of the facts and her present evaluation is reconstructed and influenced by hindsight and the additional knowledge she has obtained from the recent affidavits detailing the petitioner's history of abuse. This information was not before Dr. Goldstein at the time and she never conveyed that information to trial counsel, and her

contemporaneous analysis was far more equivocal than her affidavit and current testimony. Dr. Goldstein's contemporaneous report is a more accurate reflection of what her testimony would have been at the time.

This is not a case like *Maddox v. Lord*, 818 F.2d 1058 (2d Cir. 1987), on which the petitioner principally relies. In that case, the Court of Appeals found that it was error for the district court not to hold an evidentiary hearing to determine whether the petitioner's trial counsel provided ineffective assistance by failing to interview a potential expert psychiatric witness in support of a defense of extreme emotional disturbance. *See Maddox*, 818 F.2d at 1061-62. The Court of Appeals noted that although defense counsel raised the defense, he failed to investigate and pursue it thoroughly. *Id.* at 1061. In this case, unlike *Maddox,* this Court held an evidentiary hearing to determine what the petitioner's trial counsel did to support the defense and whether the decisions he made with respect to the potential expert testimony were reasonable. Moreover, in this case, unlike *Maddox,* defense counsel did pursue an expert psychiatrist and it was only after receiving an equivocal report that he determined not to call the witness and to seek other evidence including an effort to obtain the petitioner's recollection of the critical events through hypnosis. [FN5]

> [FN5]. It is also clear that this is not a case like *DeLucav. Lord*, 77F.3d578(2dCir.1996), in which trial counsel provided ineffective assistance of counsel by abandoning a defense of extreme emotional disturbance based on the erroneous belief that psychiatric testimony was required to support the defense. In this case, the defense was pursued, argued in opening and summation, and evidence in support of the defense was adduced through the petitioner and her mother.

*14 The decision by trial counsel not to call Dr. Goldstein was a close one. But based on the totality of the circumstances, as they existed at the time, including the equivocal nature of Dr. Goldstein's report and the possibility of some adverse testimony and the availability of the testimony from the petitioner and her mother, the petitioner has not overcome the strong presumption that counsel's decision not to call Dr. Goldstein to testif' was a strategic decision that fell within the broad spectrum of reasonable professional assistance. As the Supreme Court has instructed: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland.* 466 U.S. at 689. Because the petitioner's trial counsel's decision not to call Dr. Goldstein as a witness was not objectively unreasonable so as to deny the petitioner the effective assistance of counsel, the conclusions reached by the state trial court, and the Appellate Division in affirming the state trial court's decision, were not contrary to Supreme Court precedent, nor did they constitute an objectively unreasonable application of Supreme Court precedent. Rather, the conclusions of the state courts were wholly reasonable applications of Supreme Court precedent.

B.

The petitioner's second claim asserts that, in addition to failing to call Dr. Goldstein, the petitioner's trial counsel was ineffective because he did not investigate adequately and develop the facts sufficiently to present an effective extreme emotional disturbance defense at trial.

At the evidentiary hearing, the petitioner testified that trial counsel never asked her questions about her upbringing, her family circumstances, the abuse she received from her

grandmother, or what happened when she stabbed her grandmother, although she did tell his investigator about the events surrounding Oyola's death. (Hr. at 162-163, 167-168, 202.) She also testified that trial counsel did not prepare her to testify and that she did not know she was testiiying until the day she testified. (Hr. at 168, 210.)

However, the petitioner's testimony about her trial counsel's lack of preparation was not credible and was inconsistent with the record. The record reflects diligent efforts by the petitioner's trial counsel to develop a defense for trial.

After the petitioner implicated DeJesus to trial counsel or his investigator, trial counsel arranged for the petitioner to take a polygraph test, where she stated that DeJesus was the murderer. (Hr. at 203-204, 206.) The petitioner successfully deceived the polygraph examiner into concluding that the petitioner was not telling falsehoods. (Hr. at 240-241.) Trial counsel then arranged for the petitioner to make a second statement to the assistant district attorney where she again lied about DeJesus. (Hr. at 206.) After the petitioner saw Dr. Goldstein, trial counsel had the petitioner see a hypnotist while he was present. (Hr. at 178-179, 232-233.) The petitioner was also interviewed at least twice by trial counsel's investigator. (Hr. at 202.)

*15 While the petitioner denied being prepared for her testimony, at the same time she testified that she did not remember much of her trial because some portions of the trial were too painful. (Hr. at 218-219.) She only vaguely remembers being asked by her trial counsel about past acts of violence by Oyola. (Hr. at 218.) She testified that she never read the trial transcript because it was "too painful." (Hr. at 228.) The petitioner denied knowing that prior to the day of her testimony that she would testify and yet her trial counsel announced in his opening statement that the petitioner would testify. (Hr. at 210-211.)

The petitioner has not established that trial counsel failed to investigate and develop an extreme emotional disturbance defense at trial. The petitioner's uncorroborated testimony about her trial counsel's lack of preparation was not credible.

Moreover, pre-trial investigation "necessarily depends upon leads provided by the client." *United States* V. *Vargas,* 871 F.Supp. 623. 624 (S.D.N.Y.1994). As the state trial court found, the petitioner "has not demonstrated that most of these instances of family abuse and violence were divulged to either [trial] counsel or Dr. Goldstein prior to her trial." (R. at 19.) Nor is there a sufficient basis to conclude that the petitioner would have divulged this information if asked and that the failure to uncover this information was the fault of trial counsel. The petitioner gave trial counsel inconsistent accounts of events that occurred on the date of the stabbing and claimed not to recall actually stabbing Oyola. Dr. Goldstein reported the petitioner's reluctance to discuss the charges against her and the petitioner acknowledged that she probably was not ready to reveal any more information than she had already shared with Dr. Goldstein, much of which was elicited during the trial. Moreover, trial counsel's direct examination of the petitioner consisted of several open-ended questions that provided the petitioner opportunities to explain the events leading up to the stabbing, provide background, discuss how Oyola treated her and other family members, and explain how the petitioner could stab someone she loved. (R. at 481, 483-486, 496-498.)

Likewise, trial counsel's cross-examination of petitioner's mother, Mercedes Maldonado, was objectively reasonable under the circumstances. "Decisions whetherto engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature." *Nersesian,* 824 F.2d at 1321. Trial counsel specifically asked questions of Mercedes Maldonado aimed at eliciting testimony about Oyola's drinking and violent and abusive behavior. (R. at 347- *354.)*

The trial court sustained some objections to questions asked of Mercedes Maldonado about Oyola's past conduct because it was not shown that the petitioner had knowledge of the acts in question, but trial counsel did attempt to elicit the information about Oyola's past conduct and was successful in eliciting some of it.

*16 The petitioner specifically objects to her trial counsel's failure to interview her sister Maria Cotto, and to call Maria Cotto as a witness at trial. But she has failed to establish that this was ineffective assistance of counsel. Trial counsel's investigator made at least one attempt to speak with Maria, but was unsuccessful and it is not clear whether he made additional unsuccessful attempts to contact Maria. (Pet.'s Ex. 14.) It is also not clear that Maria was available and would have been willing to assist trial counsel. Maria admitted at the evidentiary hearing to distancing herself from her family after Oyola's death and during the petitioner's trial. (Hr. at 304-308.) She was not supportive of the petitioner during this time period: she did not visit the petitioner for two years after her arrest; she made no attempt to contact the petitioner's attorney; and she did not know when the trial occurred and "didn't ask too many questions." (Hr. at 308, 318-19.) While Maria Cotto now says that she would have been available to testify in her sister's defense if asked, that testimony is inconsistent with her detached conduct at the time. The petitioner has not shown that, at that time, Maria Cotto was a willing and helpful witness and that trial counsel did not make attempts to contact her.

Moreover, it could not be said that any failure to pursue Maria Cotto as a witness was objectively unreasonable. In both the petitioner's first videotaped statement and at trial, the petitioner stated that she had been trying to find marijuana for Maria the day of the stabbing. (February Video Tr. at 5 9-60; R. at 513.) The petitioner has now admitted that the testimony was not truthful. (Hr. at 201, 208-09.) Given

trial counsel's legitimate concerns about the petitioner's credibility, it was reasonable not to pursue a witness who could have contradicted the petitioner's testimony about events on the critical day of the murder, particularly when there was no evidence ofthe specific helpful information that would have been obtained. [FN6]

> [FN6]In the petitioner's brief, the petitioner argues that trial counsel's failure to call additional family members was objectively unreasonable, but, the petitioner has only provided evidence with respect to Maria Cotto. The petitioner has made no showing as to which other family members should have been called, what their testimony would have been and why that testimony would not have been cumulative of what the petitioner and Mercedes Maldonado could provide.

Finally, the decisions of the state trial court and the Appellate Division with respect to trial counsel's pursuit of the extreme emotional disturbance defense were not contrary to, or objectively unreasonable applications of the law established by the Supreme Court in *Strickland* and its progeny and thus there is no basis for relief under 28 U.S.C. 2254(d)(l). *See* Williams, 120 S.Ct. at 1519 *Francis*, 221 F.3d at 111. Given the circumstances, it was reasonable to conclude that the petitioner's trial counsel's decisions regarding the extreme emotional disturbance defense had plausible strategic explanations and that the petitioner received effective assistance of counsel.

C.

The petitioner's also asserts that trial counsel committed a number of other errors, the cumulative effect of which

constituted ineffective assistance of counsel. The petitioner claims that trial counsel was ineffective in failing to introduce physical evidence of Oyola's drinicing and her high blood alcohol content at the time of her death to corroborate the petitioner's testimony that Oyola had been drinlcing rum on the night that Oyola was murdered. But trial counsel's failure to introduce evidence of Oyola's drinking on the night of the stabbing does not constitute ineffective assistance of counsel in view of the fact that the assistant district attorney did not dispute the petitioner's testimony that Oyola had been drinking prior to the stabbing.

*17 The petitioner also contends that her trial counsel was ineffective for not requesting an intoxication charge. The claim is without merit. Under New York law, "evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." N.Y. Penal Law 15.25. "A charge on intoxication should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis." *People v. Perry,* 462 N.E.2d 143 (N.Y.1984); *People v. Rivera, 554* N.Y.S.2d 115, 116 (App.Div.1990).

In this case, there was no basis for an intoxication charge. The evidence that the petitioner was drinldng on the night of the stabbing came solely from her testimony. Although the petitioner stated that she was dririlcing, she testified that she was only "slightly" drunk and "tipsy." (R. at 483, 498, 503.) She admitted that despite the drinlcs, she lcnew "more or less" what was going on and that she was not that drunk. (R. at 502-503.) The petitioner told Dr. Goldstein that she was feeling" 'something,' but was not drunk." (Pet.'s Ex. 5 at 4.) This evidence is clearly insufficient to justify submitting an intoxication charge to the jury. *See Shairdv. Scully,* 610 F.Supp. 442,447 (S.D.N.Y. 1985) (finding no factual basis for an intoxication defense based on testimony that the

defendant 'had been a little drunk'); *People v. Corlez*, 584 N.Y.S.2d 609, 610 (App.Div.1992) (fmding insufficient evidence regarding the quantity of liquor consumed and its consequent effects to warrant an intoxication charge); *People v. Rios*, 541 N.Y. S.2d 489,490 (App.Div. 1989) (finding that, although the defendant had been drinking beer and brandy, there was no evidence that of intoxication warranting an intoxication charge).

D.

Finally, all of the petitioner's claims of ineffective assistance of counsel should be assessed as a whole. "[lit is important to assess a claim of ineffective [assistance of] counsel not only by an examination of each specific instance of alleged incompetence, but also by assessing the lawyer's representation as a whole." *Williams v. Senkowski*, No. 97 Civ. 3887, 1999 WL 1024514, at *4 (S.D.N.Y. Oct. 1, 1999); *see also Strickland*, 466 U.S. at 690; *Solomon v. Commissioner of Correctional Services*, 786 F.Supp. 218. 226 (E.D.N.Y. 1992). Viewing trial counsel's representation as a whole demonstrates that trial counsel provided effective representation. After learning that the petitioner was claiming that DeJesus murdered Oyola, he had the petitioner take a polygraph test to establish her truthfulness. After the polygraph test indicated that she was not lying, he brought the petitioner to the assistant district attorney with what trial counsel apparently believed was a true statement naming DeJesus as the real killer in an attempt to get the charges against the petitioner dismissed. Upon discovering that the petitioner's statement was false, trial counsel, distraught and concerned about the petitioner's lying, had the petitioner examined by a psychiatrist, Dr. Goldstein, to determine her competence and to investigate whether a mental defense was available.

*18 After receiving an equivocal report from Dr. Goldstein indicating that her ability to evaluate the petitioner was hampered by the petitioner's lack of memory of the stabbing, trial counsel received court approval to have the petitioner hypnotized in an effort to recover her memory of the event. (Pet.'s Ex. *5.)* This session failed to uncover useful information. [FN7]

> [FN7] The petitioner has provided evidence in the form ofa handwritten document indicating that the petitioner was "[p]ut under hypnosis by John Halpin," and "went back to the time of occurrence," and stated that "Grandmother called her bad name [and] [s]he went out ofher mind." She argues that this indicates that the hypnosis session should have led trial counsel to consult again with Dr. Goldstein. This document, however, is not reliable because it is not clear who wrote the document, whether it was based on first-hand infonnation, or in what context it was made. Moreover, the written statements did not provide any new information. It was already known, at least from Dr. Goldstein's report, that Oyola was "nagging" the petitioner that day. (Pet.'s Ex. 5 at 4.) The notation "She went out of her mind" is not significantly different from what the petitioner had already told Dr. Goldstein--that she "just went off." (Pet.'s Ex. 5 at 4.)

At that point, trial counsel was faced with the brutal facts that showed that the petitioner had stabbed her 79-year old grandmother numerous times and left her to die. The petitioner undisputedly had the sufficient presence of mind to engage in an effort to cover up her crime by attempting to make it look like a robbery and then she lied about what she had done on at least two occasions, including attempting to implicate an innocent person in the murder. Given these facts, trial counsel pursued the defense of extreme emotional disturbance. He questioned both the petitioner and her mother

about Oyola and provided the opportunity for the petitioner to discuss instances ofabuse. Considering the totality of the circumstances, at the time, and assessing trial counsel's representation as a whole, it cannot be said that trial counsel's representation of the petitioner was objectively unreasonable such that the petitioner was denied the effective assistance of counsel.

CONCLUSION

For the reasons explained above, the petition for habeas corpus is denied. A certificate of appealability may issue in a case only if the applicant has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. S 2253(c)(2); *Hoover v. United States,* 112 F.3d 83. 88 (2d Cir.1997). "The certificate of appealability ... shall indicate which specific issue or issues satisfy the showing required by [S 2253(c)(2) 1." 28 U.S.C. S 2253(c)(3). The Court of Appeals for the Second Circuit has held that the standard for granting a certificate of appealability is the same as the prior standard for granting a certificate of probable cause. *See Nelson v. Walker,* 121 F.3d 828, 832 n. 3 (2d Cir.1997). In order to be granted a certificate of appealability, "[t]he petitioner need not show that [the petitioner] should prevail on the merits." *Un ited States v. Rosario,* 96 Civ. 2733, 1997 WL 639039, at *1 *(S.D.N.Y.* Oct. 15, 1997); *see also Lucidore v. New York State Division of Parole,* 209 F.3d 107, 112 (2d jL), *cert. denied,* 121 S.Ct. 175 (2000). Instead, the petitioner need only demonstrate: (1) that the issues are debatable among jurists of reason; (2) that a court could resolve the issues in a different manner; or (3) that the questions are adequate to deserve encouragement to proceed further. *Lucidore,* 209 F.3d at 112 (quoting *Barefoot v. Estelle,* 463 U.S. 880. 893 n. 4 (1983)). For the reasons explained above, the Court is convinced that the petitioner has not established that she is entitled to federal habeas corpus relief. However, the issue of whether the petitioner

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was denied effective assistance of counsel because her trial counsel failed to investigate adequately and develop the facts underlying an extreme emotional disturbance defense at trial, including the failure to call Dr. Goldstein, is an issue that is debatable among jurists of reason and a court could resolve the issue in a different manner. Thus, the Court will certify that the petitioner has made a substantial showing of the denial of a constitutional right.

***19** The petition for habeas corpus is therefore dismissed. The Clerk is directed to enter judgment dismissing the petition and closing the case. The Court issues a certificate of appealability as explained above.

SO ORDERED.

2001 WL 21246 (S.D.N.Y.)

Motions, Pleadings and Filings (Back to top)

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Motions, Pleadings and Filings
Only the Westlaw citation is currently available.

United States District Court,
S.D New York.

Edgar QUINONES, Petitioner,

V.

David L. MILLER, Superintendent, Eastern Correctional Facility, Respondent.

No. Civ.10752(WHP)(AJP.

June 3, 2003.

REPORTAND RECOMMENDATION

PECK, Magistrate J.
*1 Edgar Quinones, pro se, petitions for a writ of habeas corpus from his July 10, *1995* conviction in Supreme Court, New York County, of second degree murder and second and third degree criminal possession of a weapon, for which he was sentenced as a repeat offender to concurrent terms the longest of which was twenty years to life imprisonment. *See People v. Quinones*, 272 A.D.2d 228, 228, 708 N.Y.S.2d 616,

616 (1st Dep't 2000. Quinones' amended petition claims ineffective assistance oftrial counsel on multiple grounds, including a conflict of interest. (Dkt. No. 1: Petition at 3; Dkt. No. 10: Amended Pet. ¶ 1.)

Quinones' conflict claim asserts that since his attorney, Alvin Morris, also represented Quinones' brother Dennis when Dennis was arrested for possession of a .380 caliber handgun, Dennis must be the real killer. Brother Dennis and attorney Morris are dead, so there is no way to test whether these assertions have any basis in reality. The Court's first reaction on reading

Quinones' conflict claim was that, in light of attorney Morris' and Dennis' deaths, the claim was frivolous. On further review, however, while the Court is denying the claim, it has required a great deal of analysis.

Conversely, on reading Quinones' general claims of ineffective assistance, the Court initially was troubled by some of Morris' alleged deficiencies. In deciding the petition, the Court has carefully read the entire trial transcript, and concludes that while Morris' conduct of the trial was not stellar, it did not constitute ineffective assistance.

For the reasons discussed below, Quinones' petition should be DENIED.

FACTS

Quinones' Pretrial Request for Change of Counsel

On April 24, *1995,* Quinones requested the trial court to replace his retained counsel, Alvin Morris, because, according to Quinones, Morris had neither interviewed witnesses nor filed motions. (Din. No. 20: State Am. Appendix: Quinones C.P.L. § 440 Motion Ex. P:

4/24/9 5 Transcript at 3.) The court noted that the latter was not true because "extensive motions were filed." *(Id.)*[FN 1] Further, Morris had negotiated a plea offer with the prosecution for a five- to ten-year sentence, which Quinones rejected, despite a warning from the judge that the deal "is ridiculously low" and if he turns it down and is convicted, "he faces twenty-five to life." *(Id.* at 2.) The court pointed out that Morris was *retained* counsel, and warned that any new retained lawyer would have to be prepared for trial in thirty days. *(Id.* at *4-5.)* Ultimately, Quinones did not replace Morris.

> [FN.1] This is confirmed by the contents of attorney Morris' file. *(See* Din. No. 13: Quinones C.P.L. § 440 Reply Br. Ex. A, referring to counsel's "Omnibus Motion," the State's response to the motion and the court's decision on the motion.)

Pretrial Suppression Hearing

Lamont Carter was murdered on December 31, 1992, at approximately 7:20 p.m. on the corner of 132nd Street and Fifth Avenue in Manhattan. (6/1/95 *Wade* Hearing Transcript ["H"] 5-6, 29-30.) Quinones was arrested for the crime on August 20, 1993 (Milian: H.16), aftertwo eyewitnesses-- Carol Deans and Marion Scarlett-- placed him at the scene (Milian: H. 9-11, 14, 16,28,30).

*2 On June 1 and June 2, *1995,* the court conducted a pretrial *Wade* hearing to determine the propriety of three separate photo array identifications by Deans and Scarlett and a lineup identification by Deans. (11.46.) The court heard testimony from Detectives George Milian and Ronald Baizan, who obtained the identifications. (Milian: H. 7-9, 14, 16-17; Baizan: H. 41.)

Detective Milian testified that Carol Deans witnessed the shooting. (Milian: H. 7, 28.) On January 3, 1993, just three days after the shooting, Deans identified Quinones in a photo array by stating: "'This looks a lot like the guy that did the shooting. If I had him in person, I could be absolutely sure." '(Milian: H. 9-11; *see also* Milian: H. 29-30, 34.)

Detective Milian testified that he included Quinones' brother in the photo array shown to Deans on January 3, 1993. (Milian: H. 14,23-24.) Defense counsel did not follow up on this line of inquiry. *(See* Milian: H. 24-3 4.) The judge later remarked that the pictures of the two brothers "look very much alike." (H.54.)

Detective Milian testified that the brother's name was Jorge Vasquez. (Milian: H. 23-24.) Until recently, the parties assumed that the brother in the photo array was Dennis Quinones. *(E.g.,* Dkt. No. 20: State Am. Answer ¶ 29.) However, in his most recent submission to this Court, Quinones asserted that the brother in the photo array was *"Dcwid* Quinones," apparently *another* "one of Petitioner's brothers." (Dkt. No. '22: Quinones Traverse Br. at 12.) The State agrees that the lineup photo was not of Dennis. (Dkt. No.25: A.D.A. Axeirod Aff. ¶J3-4.)

On March 1, 1993, the police interviewed the victim's "wife," Marion Scarlett. (Milian: H. 11-12.) According to Detective Milian, Scarlett immediately identified Quinones in a photo array as "the guy that was involved in the [oral] fight with" her husband on the day he was kified. (Milian: H.13-14, 27, 34-35.) Quinones' "brother" was not included in the photo array shown to Scarlett. (Milian: H. 13-14, 23.)

Late on the night of August 20, 1993, Deans again identified Quinones from a photo array. [FN2] Deans again identified Quinones' picture. (Baizan: H. 42.) At 4:30 a.m. on August21, 1993, nearly eight months after the shooting,

Quinones was placed in a lineup for viewing by Deans. (Milian: H. 16-17; H. 47.) When Deans viewed the lineup, she "started to shake" and identified Quinones by exclaiming, in a "trembl[ing] voice: " 'O[hJ, my God. He's there. He's there." (Milian: H.19-20, 30.)

> [FN 2] There is conflicting testimony as to whether that array was the one shown to Scarlett in March 1993 (Balzan: H. 4 1-42; H. 35) or the original January 1993 photo array *(see* H. 36 ("the first photo array [Deans] viewed on January 3rd was re-shown to her on August 20th"); H. 50 (Deans was shown the same photo array twice); H. 55 (same).)

Quinones was in the same number-three position in the photo arrays and the lineup. (Milian: H. 11, 14, 20.) Quinones' counsel suggested at the hearing that Quinones had been moved to that specific position in the lineup. (H.26.)

On cross-examination, defense counsel attempted to elicit from Detective Milian that Quinones' appearance differed from the others in the lineup, in that Quinones' shirt had blood on it, his shirt was on backwards, and his shoes did not have laces. (Milian: H. 24-26.) Based on the photograph of the lineup, Detective Milian conceded that Quinones' shirt did have blood on it on the night of the lineup, but could not tell whether Quinones' shirt was on backwards or whether his shoes had laces. (Milian: H. 24-26.)

*3 Quinones' counsel Morris moved to suppress the identifications, but he presented no witnesses and presented no argument at the conclusion of the hearing other than asserting that the detectives' testimony was "entirely self-serving." *(See* H. 43-46.)

At the conclusion of the hearing, the court found Detective Milian's and Detective Baizan's testimony "to be credible"

(H.47) and held that none of the four pretrial identifications was suggestive *(11.54,* 58-59). Although the ages and hairstyles of the men in the photos differed, the court termed this a "distinction without significance." (H.52-53.) All the men pictured "appear to be Hispanic," all had the same skin tone, and all but one had similarly shaped eyes and pencil-thin mustaches. (H.52-53.) The court concluded that there was nothing in either photo array that would automatically draw the eye to one photograph as opposed to the others. (11.54.) While the court was somewhat troubled that Deans was shown the same array on January 3, 1993 and again on August 20, 1993 just before she identified Quinones in the lineup, the court's concerns were alleviated by the intervening time period between the two photo arrays and Deans' pronounced reaction to the lineup. (H.55-56, 58-59.)

As to the lineup, the court noted that all of the participants were seated so height was not a variable, and while one (not Quinones) wore a white shirt which could have stood out, the lineup participants' skin tones and hair length didnot vary markedly. (H.56-57.) While the defense had raised a question as to whether Quinones' shirt was blood-stained and whether his shoelaces were missing, the court saw no blood on Quinones' shirt in the lineup photograph, and was unable to tell if his shoes were laced up or not. (11.57-58.) The court concluded: "I cannot say that the line-upby its composition was suggestive. Nor is there any evidence that the conduct of the lineup, itself, was suggestive." (11.58.)

The Defense Opening Statement at Trial

Defense counsel Alvin Morris told the jury in his opening that "the wrong man is being accused of this murder." (Trial Transcript ["Tr."] 395.) He also said that the victim was a drug dealer who was killed by other drug dealers who wanted his drug spot, and that the drug dealers chose to put the blame on Quinones. (Defense Opening: Tr. 395-96.) He asked the

jury to use their "common sense" as they listened to the prosecution's evidence, and concluded by stressing the prosecution's burden of proving guilt beyond a reasonable doubt. (Defense Opening: Tr. 396-97.)

The Prosecution Case at Trial

Carol Deans and Detective Milian

Carol Deans, a "friend" of Carter's for over twenty-five years, testified that on December 31, 1992, at approximately 7:15 p.m., she was walking east on 132nd Street near Fifth Avenue when she saw Carter "talking" with "somebody"--a "young man" "standing next to him." (Deans: Tr. 42 1-23, 427-28,433-35,449.) From inside his jacket, "the young man took out a gun and started firing" ten shots at Carter. (Deans: Tr. 422, 427-29, 441.) The shooter was "young," "very fair-skinned," and "tall"--"5'6", 5'7"." (Deans: Tr. 427, 435-3 6.) Deans described the shooter's hairstyle as "cut bald" or "shaved off' like that of an "average Black man." (Deans: Tr. 45 1-52.) He was wearing a black jacket and "could have been" wearing a black baseball cap. (Deans: Tr. 436-37.) Deans described the gun as a "9 millimeter" based on its "square shape." (Deans: Tr. 428.)

*4 It was turning nightfall but not really dark, and there was good lighting, so Deans had no "problems" seeing the shooting. (Deans: Tr. 424-26.) She told the police that she saw the shooting from fifty feet away, although she was not "good" with distances. (Deans: Tr. 425, 437.) After the shots were fired, the shooter "stopped and he was uncertain which direction to turn." (Deans: Tr. 430.) When the shooter "turned," Deans "saw him" and then he "ran" "into the projects." (Deans: Tr. 429-3 0.) "Just as [Deans] walked up and got to the corner, it was over and done with, within seconds." (Deans: Tr. 453.) Deans was "[j]ust in shock" immediately after the shooting it "[t]ook [her] time to get

[herself] together in order to move." (Deans: Tr. 455, 461-62.) She spoke to the police later on the night of the shooting and again on January 3, 1993. (Deans: *Tr.* 430-31, 453-55; Milian: Tr. 525.)

At trial, Deans was unable to identify Quinones as the shooter:

Q. The person that you saw talking to Lamont Carter eventually firing the weapon, do you see him in court today?
A. I don't know.
Q. You don't know?
A. No. I just had sort of a profile.
Q. Are you saying you are unable to identify him today in court?
A. Yeah.
(Deans: Tr. 429.)
Q.... When you came into this court today you indicated you couldn't say that this is the person that you saw on the 31st of December, 1992, correct?
A. That is true.
(Deans Tr. 433.) [FN3] Prior to the shooting, Deans had never seen Quinones before. (Deans: Tr. 450-5 1.)

> [FN3]. Quinones asserts that Deans testified that she saw the shooter "at an angle." (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 32.) In fact, her testimony was far more ambiguous:
> Q. That photograph that I've just shown you, that is People's 1 in evidence, to your knowledge, does that appear to be taken where you were standing when you viewed this?
> A. Yeah, because--Yes. Yes. The corner is right here. I mean the curb is right there. So, it's like the angle, yes. (Indicating)
> (Deans: Tr. 426-27.)

Deans testified, without objection, that at 4:30 a.m. on August 21, 1993, nearly eight months after the shooting, she viewed a police lineup of several "sitting" individuals and selected number three as the shooter. (Deans: Tr. 431; Milian: Tr. 528, 531-32.) In court, Deans viewed a photograph of the lineup and circled individual number three as the shooter, whom counsel stipulated was Quinones. (Deans: Tr. 431-32; Milian: Tr. 532-33.)

Detective Miliantestifiedthat upon viewing the August 21, 1993 lineup, Deans "immediately began to shake, and she said 'Oh, my God. Oh, my God. It's him.'" (Milian: Tr. 528, 531-32.) After some hesitation, Deans said "'It's Number 3. He's the one that shot Lamont" Carter. (Milian: Tr. 531-33.) [FN4]

> [FN4]. Defense counsel Morris elicited from Detective Milian that Quinones had small blood stains on the front of his shirt during the lineup, thus throwing into question the lineup's fairness. (Milian: Tr. 534-36, 55 1-53.) When asked whether Quinones had been "beaten" prior to the lineup, Detective Milian stated that "necessary force was utilized" when the "defendant resisted arrest," resulting in a bloody shirt. (Milian: Tr. 536-38.)

On cross-examination, Quinones' counsel, Morris, first had Deans repeat that she could not identify Quinones in court as the shooter. (Deans: Tr. 433, quoted atpages 7-8 above.) Morris then asked Deans if she was aware that Carter was a drug dealer, which Deans denied. (Deans: Tr. 434.) Morris next established that Deans and Ed Smith were "lovers," but Deans denied Morris' assertion that Smith and Carter were partners in the drug trade. (Deans: Tr. 434-35, 450.) According to Deans, she, Carter and Smith "were all friends together." (Deans: Tr. 435,449.) Deans also denied that Smith

was present at the time Carter was shot. (Deans: Tr. 435, 449-50.)

*5 While cross-examining Deans, Quinones' attorney Morris established that Deans' daughter (who was thirteen or fourteen years old at the time of the shooting) was standing with Deans when the shooting occurred. (Deans: Tr. 441- 45, 460.) Deans' daughter ran into the beauty parlor to inform Scarlett that Carter had been shot. (Deans: Tr. 445.) Morris asked Deans, but the Court precluded Deans from answering: "Did you in any way stop your daughter from coming here to this court and testifying as a witness in this case." (Deans: Tr. 445, 448.) The judge also quashed, on hearsay grounds, the question: "Are you aware of the fact that your daughter said that this is not the person who was there at the time?" (Deans: Tr. 446-48.) Outside the jury's presence, Morris explained his question by stating "[hjer daughter spoke to me." (Deans: Tr. 447.) Morris thus implied to the court that Deans' daughter had told him that Quinones was not the shooter. *(See* Tr. 446-47.) Detective Milian testified that although Deans' daughter was present at the shooting, the police did not speak to her, apparently because Deans said that the daughter "'didn't see what happened because she was behind me." '(Milian: Tr. 540-41, 553.) On cross-examination, the court precluded Detective Milian from answering whether it was "a fact that the reason why you didn't interrogate [Deans'] daughter is because her daughter said a tall Black man did this shooting?" (Milian: Tr. 540.)

Marion Scarlett

The victim's "girlfriend," Marion Scarlett, identified Quinones at trial as the man her husband was speaking to before the shooting. (Scarlett: Tr. 470, 474-75.) Scarlett worked in a beauty salon across the street from where the shooting tookplace. (Scarlett: Tr. 471,480.) On the night of the shooting, Scarlett saw Carter leave a pizza parlor and stop

to "talk" to a man, whom she identified in court as Quinones. (Scarlett: Tr. 47 1-75.) She described Quinones' appearance that night as "a young man, light-skinned Spanish. He had on a black-and-white leatherjacket, black pants...." (Scarlett: Tr. 474.) Although she described Quinones as "[t]aller than" her five feet, six inches, when Quinones stood up in court she said "[h]e seemed taller to me." (Scarlett: Tr. 490-91.)

As Quinones and Carter were talking, Scarlett approached Carter, "pull[ed] on his sleeve" and told him that she was ready to leave. (Scarlett: Tr. 475-76.) Quinones became "agitated" "[bjecause [Carter] had turned his attention to [Scarlett] and he was answering backto" Scarlett. (Scarlett: Tr. 476-79.) Quinones "said like 'Yo, I'm talking to you, man." '(Scarlett: Tr. 477.) Scarlett did not pay attention to what Quinones and Carter had been "discussing." (Scarlett: Tr. 477.)

Scarlett returned to her beauty salon, and observed Carter and Quinones crossing the street together. (Scarlett: Tr. 479-82, 502-03 .) Scarlett estimated that "five or ten" (or "ten or fifteen") minutes later she heard "lots" of gun shots, and a girl came running into the shop saying, "'Your man is down. Your man is down." '(Scarlett: Tr. 482-83, 497-99, 503.) Since Scarlett did not actually see the shooting, she could not state whether Quinones was the shooter. (Scarlett: Tr. 481-83,491,498.) Scarlett ran across the street to where Carter was lying on the ground. (Scarlett: Tr. 484.) She spoke to the police about what she had seen. (Scarlett: Tr. 486.)

*6 Quinones' counsel Morris brought out that Scarlett had never before seen the person who had the argument with Carter. (Scarlett: Tr. 488.) Scarlett testified on cross-examination that she only saw Carter and Quinones talking together, and did not "see anybody else there." (Scarlett: Tr. 494-95.) After her recollection was refreshed by reading Detective Milian's report, she remembered having told the

police that, prior to the shooting, she saw Carter talking with "three other people" in addition to Quinones. (Scarlett: Tr. 495- 97.) [FN5]

> [FN5]. On cross-examination, Deans denied telling the police that she "observed several males talking with the deceased." (Deans: Tr. 440.) Rather, Deans testified that Carter and the shooter were talking together, while the other men were "two or three feet away"--they were not "all talking together." (Deans: Tr. 438-41.)

On cross-examination, Scarlet acknowledged that Carter sold drugs and "suppose [dl" that Ed Smith (Deans' boyfriend) was his partner. (Scarlett: Tr. 493.) Scarlett claimed not to know Deans at the time of the shooting (Scarlett: Tr. 491-92), though Deans had testified that she had been friends with Carter for over twenty-five years, Scarlett was friends with Deans' boyfriend, Ed Smith, and Deans' daughter knew to find Scarlett in the salon (Scarlett: Tr. 492-94). Defense counsel Morris elicited from Police Officer Ramos that Carter was found with a beeper and 43 crack vials. (Ramos: Tr. 587-88; *see also* Milian: Tr. 544- 45.) Defense counsel also established on cross-examination of the medical examiner that Carter used cocaine--he had "cocaine breakdown product in the blood and in the brain," indicating that "he had taken cocaine recently" before his death. (Hayes: Tr. 520-2 1.)

Upon defense counsel's argument at a charging conference, the court agreed to charge the jury that they could consider that Carter was a drug dealer, but only for the purpose of determining Deans' credibility, given that she testified that she did not know he was a drug dealer despite being friends with him for over twenty-five years. (Tr. 642-46; *see also* **Tr.** *561-65,* 723-24.)

Additional Police Testimony

Detective Mary Dugan of the Crime Scene Unit testified that although the murder weapon was not found at the crime scene at 132nd Street and Fifth Avenue on December 31, 1992 (Dugan: Tr. 399, 401-02, 414, 416), the discharged shell casings came from a .380 caliber semi-automatic handgun (Dugan: Tr. 405-07, 413, *415).* There were no fingerprints on the shell casings (Dugan: Tr. 408), although "it's very unusual to find a fingerprint on bullets *[i. e,* shells] that have been fired" (Dugan: Tr. 417). The parties later stipulated that another ballistics detective would have testified that the six shell casings found at the scene and the six bullets removed from Carter's body came from a .380 caliber semi-automatic pistol. (Tr. 633-3 5.)

Quinones' counsel Morris did not object to Police Officer John Ramos' testimony that an unidentified woman at the crime scene yelled, "'[t]he Puerto Rican did it." ' (Ramos: Tr. *575-76.)* On cross-examination, however, Morris established that this reference to the "Puerto Rican" was not in Officer Ramos' notes, nor did anyone at the scene go over to Officer Ramos and state that she was a witness. (Ramos: Tr. 579-8 1.)

*7 Before the arresting officers testified, Morris asked the court to instruct them not to say they were members of the "Career Criminal Apprehension Unit." (Tr. 592.) The court agreed, but also expressed surprise that there was no objection when Detective Milan earlier testified in passing (Milian: Tr. 527) about that unit. (Tr. 597-99.)

Detectives Sheridan and Kaplan testified that when plain clothes detectives approached Quinones to arrest him in August 1993, Quinones "pushed" the "small child" he was walking with, ran onto First Avenue, and resisted arrest. (Sheridan: Tr. 60 1-02, 6 13-14; Kaplan: Tr. 619-2 1, 629-3 0.) Defense counsel elicited that the detectives were all in plain clothes and did not produce badges before approaching and grabbing Quinones (Sheridan: Tr. 604-0 5), presumably explaining Quinones' flight and resistance. The judge later

established that the plain clothes detectives had not identified themselves as such until they were actually subduing Quinones. (Kaplan: Tr. 622, 629.) Detectives Sheridan and Kaplan repeatedly denied that any of the arresting officers had struck Quinones, testifying that they "used necessary force to bring him to the ground." (Sheridan: Tr. 606-07, 610-11; Kaplan: Tr. 623-24, 626.)

Defense Motion to Dismiss

After the State rested, Quinones' counsel Morris moved to dismiss, arguing that no witness had identified Quinones in court as the shooter. (Tr. 636.) Defense counsel noted that "a careful perusal ofthe testimony of the lady who allegedly participated in the lineup testified that she identified a profile of a person seated in Seat Number 3. She said she did not identify the defendant as he sits in court as being in that particular seat." (Tr. 637.) The court denied the motion. (Tr. 638-39; *see also* Tr. 640-42.) The defense rested without calling any witnesses. (Tr. 639.)

Colloquy Re Possible Defense Witnesses

The defense called no witnesses at trial. *(See* Tr. 639.) Just days before trial was to begin, defense counsel had informed the courtthathe had "witnesses who allegedly were there at the time of the incident." (Tr. 3.) However, counsel hadn't "seentheinyetbecause [he is] a very busy practitioner," but expected to see them before the trial began. (Tr. 3-4.) At the beginning of voir dire, on June 6, 1995, Quinones' counsel Morris notified the court that he had two possible witnesses: Aaron Bishop and Damon White. (Tr. 9,22-23.) During voir dire, on June 7, 1995, at defense counsel's request, the trial judge issued subpoenas on behalf of the defense to "Damond White" and "Aaron Bishop, Jr." who defense counsel described as two witnesses that he might call, "maybe." (Tr.

267-68; Dkt. No.1: Pet. Ex. B: Quinones 3/29/00 1st Dep't Reply Br. Supp. Rec. at 6, 7.)

Carol Deans' daughter--who allegedly told Quinones' counsel Morris that Quinones was not the shooter *(see* pages 9-10 above)--was not called to testify by either party. As the State neared the end of its case, the court questioned the defense about its witness list: "My question to you is whether there is a Defense case ...," to which defense counsel Morris replied, "Your Honor, I'm going to flip a coin now. I have been looking for a witness or two witnesses for a while now, and unless a miracle happens this evening--my office tells me somebody has called, et cetera, et cetera--I do not have any witnesses." (Tr. 559-60). The next day, the court asked "Mr. Morris, just as a timing mechanism, did any miracles occur last evening?" (Tr. *595.)* Morris responded: "No. Unfortunately, I guess I'm a bad guy." (Tr. *595-96.)*

Defense Swnmation

*8 In his summation, defense counsel Morris emphasized that Deans was unable to identify Quinones as the shooter in court (although counsel also mischaracterized the testimony by asserting that Deans said"'That is not the man"'). (Defense Summation: Tr. 653-55.) Morris highlighted Deans' testimony that she had only seen a "profile." (Defense Summation: Tr. 655.) Morris, however, seemed to confuse that testimony, asserting that Deans had testified that she only saw a profile at the *lineup* rather than at the shooting. *(Id.)*

Morris attacked Deans' credibility, noting that Deans had denied that Carter or her boyfriend Smith were drug dealers or that she knew Scarlett, when the evidence was to the contrary. (Defense Summation: Tr. 656-57.) Morris pointed out that Scarlett admitted that Carter and Smith were drug dealers. (Defense Summation: Tr. 656-57.) Morris noted certain other inconsistencies in the eyewitness' description of

the shooter (and the shooter's gun), such as Deans' testimony that the shooter was "tall," whereas Quinones was not much taller than Deans' five foot six inches. (Defense Summation: Tr. 657-59, 664.) Morris also pointed out that Scarlett had described the shooter's hair as that of a "Black man," while Quinones was a "light-skinned Hispanic." (Defense Summation: Tr. 659.) Morris asserted that perhaps twenty minutes elapsed between the time Scarlett left Carter and the shooting--more than enough time for Quinones to leave and another person to commit the shooting. (Defense Summation: Tr. 667- 68.)

Morris questioned why Deans had not contacted the police sooner, implying that her story was fabricated. (Defense Summation: Tr. 660-62.) Importantly, Morris asserted that Deans' daughter was "the person who really knew who the shooter was," but that th : State had failed to call her. (Defense Summation: Tr. 662- 64.)

Finally, Morris reminded the jury that Carter was a drug dealer, and died holding 43 vials of crack. (Defense Summation: Tr. 668-69.) "When a partner becomes deceased, generally the other partner takes all the business...." (Defense Summation: Tr. 669.) Morris thus implied that Quinones was framed, as the victim's partner was Ed Smith, and the only alleged eyewitness to the shooting was Smith's "paramour." *(Id.)*

Prosecution Summation

In its summation, the State ridiculed defense counsel Morris' failure to support his opening statement claim that Quinones was being framed by the drug dealers who actually killed Carter. (State Summation: Tr. 672-74.) The prosecutor theorized that when drug dealers kill their competitors, they just do it, without getting the police involved by trying to frame someone else. (State Summation: Tr. 673.)

The State asserted that if Deans' daughter had exculpatory testimony, the defense would have called her. (State Summation: Tr. 679.) The State further claimed that Deans had not approached the police earlier because of fear, and that Deans failed to mention her daughter to the police in order to protect her daughter. (State Summation: Tr. 676-79.)

*9 Defense counsel's only objection (overruled by the court) was to the prosecutor's statement that Deans had not identified Quinones in the courtroom because "just like at the lineup, she froze." (State Summation: Tr. 682.) The prosecutor elaborated on this theory, asserting that Deans had suppressed her recollection due to "trauma ." (State Summation: Tr. 683.) The prosecutor's trauma theory, however, had no basis in the record and seemed to contradict Deans' own testimony that she did not recognize the shooter in court because she "just had sort of a profile" (Deans: Tr. 429). (State Summation: Tr. 682- 85.)

The prosecutor asserted that the jury should disregard Scarlet's time estimate that she saw Quinones and Carter talking five to fifteen minutes before the shooting, since her perception of time was probably distorted: "When things are not going so great, or something traumatic or terrible happens, it seems like time goes on forever. Two minutes can seem like fifteen minutes." (State Summation: Tr. 680, 690.)

Although the police did not identify themselves when they approached Quinones to arrest him, the prosecutor speculated that Quinones must have known they were the police: "I submit to you when this defendant saw those people approaching, he made them for police officers. You know, it's not too difficult to make plain clothes cops for who they are." (State Summation: Tr. 692.) He then asserted" [i]f[Quinones] wasn'tthe killer, if some other person out there did it, what's he running for?" (Tr. 693.)

Juiy Charge

The court's jury charge echoed both counsels' mischaracterization of Scarlett's testimony by saying that Carter and Quinones were having a dispute: "within minutes of his being shot, the defendant was having some kind of a dispute or agitated discussion with the deceased, Lamont Carter." (Charge: Tr. 742; *see* Defense Summation: Tr. 658, 666-67, & State Summation: Tr. 686-87, 689, referring to a verbal "argument" between Carter and the shooter.) In discussing Deans' failure to identify Quinones in the courtroom, the court commented that Deans' memory was perhaps "fresher" at the lineup than at trial, since it was "shortly after" the crime. (Charge: Tr. 744-45.)[FN6]

> [FN6]Again, the lineup was conducted over seven months after the shooting, and the trial took place nearly two years after the lineup.

Defense counsel raised only one exception to the jury charge--asking the judge to clarify that Deans had not made an in-court identification (Charge: Tr. 751- 52), which the court did (Charge: Tr. 752-53).

Jury Deliberations

The jury began deliberations at about 12:30 p.m. on June 14, 1995. (Tr. 754.) The jury asked for and received a read-back of Deans' testimony and a further explanation of "reasonable doubt." (Tr. 759-67.) At 5:40 p.m. that day, the jury sent out a note stating that they were "at an impasse." (Tr. 771.) The court responded with an *Allen* charge and sent the jury to dinner. (Tr. 77 1-72, 774-76.) The jury resumed deliberations at 7:30 p.m., and at 8:10 p.m. sent out a note reading: " 'We, the jury, are hung and we feel strongly that further deliberations will not change the convictions of the divided jury." '(Tr. 777- 78.) The Court responded with a second

"somewhat stronger" *Allen* charge, without objection. (Tr. 779-86.) The jury resumed deliberations on June 15, 1995 at approximately 10 a.m. (Tr. 813), and reached a verdict at 11:45 a.m. (Tr. 814-15).

Verdict and Sentence

*10 On June 15, 1995, the jury found Quinones guilty of second degree murder and criminal possession of a weapon in the second and third degrees. (Verdict: Tr. 8 16-20.)

On July 10, 1995, the court sentenced Quinones, as a predicate felon, to concurrent terms of twenty years to life, 7-1/2 to 15 years, and 3-1/2 to 7 years, respectively. (Sentence: Tr. 5-8.)

Direct Appeal

Represented by different, assigned counsel, Quinones appealed to the First Department [FN7] on the grounds, *inter alia,* that his trial counsel rendered ineffective assistance by: (1) failing to offer a coherent theory of the case (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 39-45); (2) failing to object to the admission of multiple items of evidence--especially hearsay and Deans' pretrial identification *(id.* at 45-46); (3) asserting various ineffective arguments *(ii* at 46-47); (4) making no attempt to obtain possibly favorable evidence from Deans' daughter *(id.* at 48); (5) failing to object to several improper statements and arguments in the prosecutor's summation *(Id.* at 48-51); and (6) failing to object to improper jury instructions, particularly where testimony was mischaracterized *(Id.* at 51-52). Further, Quinones alleged that trial counsel's aggregated errors constituted ineffective assistance in violation of the Sixth Amendment even if the individual errors did not. *(Id.* at 53-5 8.)

> [FN7]. Quinones' opening brief to the First Departmentis datedSeptember29, 1999 (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 61), over four years after the July 10, 1995 sentencing. At least part of this delay was caused by Quinones' appellate lawyers' repeated requests for extensions in order to "review and gather information" and to move for funds to hire an investigator. (Dkt. No. 13: Quinones C.P.L. § 440 Reply Br. Ex. E: Schmidt Aff. ¶ 3; *see also ii* Ex. C: Schmidt Letters; *id.* Ex. D: Motion for Investigator.)

On May 23, 2000, the First Department affirmed Quinones' conviction, denying his ineffective counsel claims: On the existing record, we conclude that defendant received meaningful representation. Counsel's alleged deficiencies did not deprive defendant of a fair trial. *People v. Quinones.* 272 A.D.2d 228. 229, 708 N.Y.S.2d 616, 616 (1St Dept 2000) (citations omitted). [FN8] The New York Court of Appeals denied leave to appeal on August 14, 2000, *People v. Quinones,* 95 N.Y.2d 870, 715 N.Y.S.2d 224 (2000), and denied Quinones' pro se motion for reconsideration on December 26, 2000, *People v. Quinones.* 95 N.Y2d 968, 722 N.Y.S.2d 485 (2000).

> [FN8]. Although the First Department also denied most of Quinones' other claims (including for sufficiency of the evidence and various evidentiary rulings), it reversed the trial court's revocation ofQuinones' probation. *Id.* at 229, 708 N.Y.S.2d at 616.

Quinones' Habeas Petition and Amendment

Quinones' timely pro se habeas corpus petition, dated October 15, 2001 and received by the Court's pro se office on October 26, 2001, asserted the same ineffective assistance of

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counsel claims that Quinones had raised before the First Department. (Dkt. No.1: Pet. at 3, referencing Pet. Ex. A: Quinones 1st Dep't Br.)

Quinones wrote to this Court on May 10, 2002, stating that he had retained counsel, Anthony Ricco, Esq., to file a C.P.L. 440.10 motion in state court (on unstated grounds), and that if such motion did not "prevail," he would move to amend his habeas petition. (Dkt. No. 8: Quinones 5/10/02 Letter.) The Court directed Quinones to amend his habeas petition and promptly file the C.P.L. § 440 motion. (Dkt. No. 8: 5/14/02 Memo Endorsed Order.) By letter to the Court dated May 23, 2002, Quinones' new counsel, Ricco, asserted that Quinones' trial counsel, Alvin Morris, had a conflict of interest because he simultaneously represented Quinones' deceased brother, Dennis Quinones, who was the actual murderer. (Dict. No. 9: Ricco 5/23/02 Letter.) This was the first notice given by Quinones or his counsel to any court, state or federal, of such an alleged conflict. *(See ii* at 2: "Although the issue of ineffective assistance of counsel was raised below in the state court proceedings the specific claim of 'conflicted counsel' was never previously litigated.") Ricco noted that Quinones had retained a retired New York City detective as an investigator, and that the investigation would be completed "expeditiously so that an application for relief ... can be made on the basis of reliable investigatory work and not simply toothless allegations." *(Id.)*

*11 On May 29, 2002, Quinones moved, pro Se, to amend his petition (Dkt. Nos. 10-11: Quinones Motion to Amend), and by order dated June 7, 2002 (Dkt. No. 11: 6/7/02 Memo Endorsed Order), this Court granted Quinones' motion, thereby adding two additional ineffective counsel claims: (1) Whether petitioner was deprived of his Constitutional right to "conflict free" representation where attorney, Alvin C. Morris, Esq., simultaneously represented petitioner and his brother, Dennis Quinones, on unrelated charges, knowing full

well that the .380 caliber handgun Dennis Quinones was indicted for in Bronx County may have been the same weapon used to murder Lamont Carter.
(2) Whether petitioner was deprived of his Constitutional right to "conflict free" representation where attorney, Alvin C. Morris, Esq., failed to call an eyewitness who would have exculpated petitioner, but would have identified Dennis Quinones, petitioner's brother, as the actual shooter. (Dkt. No. 11: Quinones 5/29/02 Aff. ¶ 1.) This Court also ordered Quinones to exhaust these claims in state court by way of a C.P.L. § 440 motion. (Dkt. No. 11: 6/7/02 Memo Endorsed Order.)

Quinones' C.P.L. § 440 Motion

On June 26, 2002, Quinones filed a pro se C.P.L. 440.10 petition in state court, asserting that because of a conflict of interest, his trial counsel rendered ineffective assistance. (Dkt. No. 20: State Am. Appendix: Quinones 6/26/02 C.P.L. § 440 Aff. & Quinones C.P.L. § 440 Br.) Quinones alleged that because his trial counsel, Alvin Morris, formerly represented his brother, Dennis Quinones, Morris refrained from asserting at trial that Dennis committed the Carter shooting, even though certain evidence suggested that Dennis--rather than Edgar Quinones--mayhavebeenthe shooter. [FN9] (Quinones 6/26/02 C.P.L. § 440 Aff. ¶11 18, 22-23; Quinones C.P.L. § 440 Br. at 5-10.) Quinones' C.P.L. § 440 motion requested the state court to order a ballistics comparison of the .380 caliber gun found in Dennis' possession and the .380 shell casings from Carter's murder. (Quinones 6/26/02 § 440 Br. at 6, 16-17.)

> [FN9]. For ease of reference, petitioner Edgar Quinones will be called "Quinones" and his brother Dennis Quinones will be called "Dennis ." No disrespect is intended.

The parties agreed on the key facts. On February 14, 1993, six weeks after Carter's murder, "Jose Medina--AKA Dennis Quinones" was arrested in the Bronx for criminal possession of a .380 caliber handgun. (State Am. Appendix: Quinones C.P.L. § 440 Motion Ex. I: 2/14/93 Criminal Complaint; *see also* Quinones C.P.L. § 440 Exs. K & L.) [FN1O] On February 19, 1993, Morris filed a notice of appearance as Dennis' attorney of record on that arrest. (Quinones C .P.L. § 440 Ex. K: 2/19/93 Notice of Appearance; Din. No. 13: A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 17.) On March 16, 1993, when Dennis failed to appear in court on the gun possession charge, a bench warrant was issued for his arrest. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 16.)

> FN10]. The State misstates the date of Dennis' arrest as February 19, 1993. (Din. No. 13: A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 16.)

Several months later, on August 20, 1993, petitioner *Edgar* Quinones was arrested for Carter's murder. (Milian: H.16.) On January 3, 1994, Morris filed a notice of appearance on Quinones' behalf in the criminal case underlying this habeas petition. (Quinones C.P.L. § 440 Ex. K at 2.) Quinones' trial for the Carter killing began June 1, 1995, and he was sentenced on July 10, 1995. *(See* pages 3, 18 above.) The police did not finally track down Dennis (who had been missing since March 1993) until September 5, 1996, over one year after Quinones' sentencing. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 16; Quinones C.P.L. § 440 Br. at 6 n. 18; *see* Quinones C.P.L. § 440 Ex. L: *12/5/96* Superseding Indictment of Dennis.) [FNI1]

> [FN11]. The State claims that "[d]uring the entire time [Quinones'] case was pending there was no active case against [Dennis]." (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 16.)

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6/26/02 C.P.L. § 440 Aff. ¶22; *see also id.* ¶f 17, 19; *see also* Dkt. No. 22: Quinones Traverse at 11-12.) Quinones' affidavit does not clari' whether he was unaware that his brother had been arrested for handgun possession, or unaware that his brother had been arrested for possession of a *.380. (See* Quinones C.P.L. § 440 Br. at 6 n. 20 (Quinones was unaware until recently that "Dennis Quinones was arrested for possessing a .380 semiautomatic" handgun); Quinones C.P.L. § 440 Reply Br. at 10 ("The information concerning the .380 recovered from Dennis Quinones was discovered by [the] Private Investigator...."); Dkt. No. 16:Quinones § 460 1st Dep't Br. at 14.) It seems likely, however, that Quinones knew at the time ofhis trial that: (1) he and Dennis looked alike (if, indeed, they do look alike, which is now open to doubt); (2) Dennis had been arrested for gun possession; and (3) Morris had originally defended Dennis on the gun charges in 1993, as Dennis advised their family to retain Morris to defend Quinones. (Quinones 6/26/02 C.P.L. § 440 Aff. ¶ 18 n. 10.) Thus, it appears that Quinones was merely unaware until recently that Dennis' arrest involved a .380 handgun. Quinones, however, said for the first time in his appeal of the denial of his § 440 motion that he did not "realize" until 2002 "that Mr. Morris represented the Quinones brothers simultaneously." (Quinones § 460 1St Dep't Br. at 14.)

*13 Quinones also argued to the § 440 court that because of his divided loyalties, Morris failed to call a number of exculpatory witnesses at trial. (Quinones C.P.L. § 440 Br. at 10-15.) For example, according to Quinones, Malik Abdullah Alcili, a friend of Carter's and an eyewitness to the crime, maintained that Quinones was not the shooter. (Quinones C.P.L. § 440 Br. at 12 & Ex. G: Akili 4/27/02 Aff.) Akili's

description of the murderer's clothes was similar to that given by Deans and Scarlett (Quinones § 440 Br. at 12), but Akili said the Hispanic male was taller and wider than Quinones (Quinones C.P.L. § 440 Ex. G: Akili Aff. at 1.) Akili signed an affidavit on April 23, 1997 swearing that Quinones was not the shooter and that he was never approached by Quinones' attorney to testify to that effect. (Akili Aff. at 1- 2.) Akili's name was written on Quinones' trial counsel Morris' notes of potential witnesses. (Quinones C.P.L. § 440 Ex. H.) [FN14]

> [FN14]. Counsel's notes also contained the name of another uncalled witness, Nathaniel Battle, who, according to counsel's scribbled notes: "Saw crime-- Person from Bldyn did it." (Quinones C.P.L. § 440 Ex. H.)

In addition, Quinones argued that Morris should have called Deans' daughter, as she witnessed the shooting and allegedly told Morris that Quinones was not the shooter. (Quinones C.P.L. § 440 Br. at 13; Tr. 446-47.)

Finally, based on the above evidence, Quinones moved the § 440 court to order a ballistics test to determine whether Dennis' gun was the murder weapon. (Quinones 6/26/02 C.P.L. § 440 Aff. Jf 24-26; Quinones C.P.L. § 440 Br. at 16-17; Quinones C.P.L. § 440 Reply Br. at 8-1 1.)

The State Opposition to Quinones ' § 440 Motion and His Reply

In its opposition to the § 440 motion, the State raised several arguments. First, the State argued that although Morris represented Dennis when he was first arrested in February 1993, Morris did not represent Dennis when he reappeared in

1996. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶J 17-19.) [FNI5] Thus, according to the State, Morris only represented Dennis for a short period in 1993--months before Quinones was even arrested for the Carter shooting. *(Id.)* In reply, Quinones pointed out that "[ejven though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets." (Quinones C.P.L. § 440 Reply Br. at 3.) Thus, according to Quinones, even if Morris no longer represented Dennis at the time of Quinones' trial, Morris had a continuing duty to Dennis that caused a conflict of interest. *(Id.)*

> [FN 15]. The State asserts that when Dennis reappeared in court on September 5, 1996, he was represented by "Victor Dailey Rivera." *(Id.* at ¶ 17.) The documents submitted by the State, however, show Dennis represented on September 5, 1996 by assigned counsel Elliot Charles Shapiro. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. Ex. A.) Dennis was later represented by "Daly-Rivera" (which the State translated as "Victor Dailey Rivera") at his December 18, 1996 arraignment, September 19, 1997 plea, and October 9, 1997 sentencing. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶f 17-19 & Ex. B.)

Second, the State argued that at Quinones' sentencing, when the trial judge asked him if he had anything to say, he replied with a simple "no." (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 20.) According to the State, if Quinones knew that his counsel had failed to call exculpatory witnesses such as Akili and Deans' daughter, Quinones would have "shout[ed] from the rafters that his attorney had sold him out." *(Id.; see also id.* ¶ 24.) Nor were Quinones' conflicted counsel ineffective counsel claims raised on direct appeal. *(Id.* ¶ 21.) Quinones replied that prior to the trial he *had* complained to the judge about Morris' failure to investigate, to no avail. (Quinones

C.P.L. § 440 Reply Br. at 6 citing Ex. P: *4/24/95* Conf Transcript.) More importantly, Quinones correctly asserted that ineffective counsel claims involving matters outside the record must be brought by way of a C.P.L. § 440 motion--not at sentencing or on direct appeal. (Quinones C.P.L. § 440 Reply Br. at 6.)

*14 Third, the State asserted that although Quinones had raised a host of generic ineffective counsel claims on direct appeal *(see* Pet. Ex. A: Quinones 1st Dep't Br. at *39-58),* he had intentionally delayed raising his conflict of interest claims until both Morris and Dennis were dead, so that the court would be unable to probe Morris for any "trial strategy" behind, for example, Morris' failure to call the various missing witnesses. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶J 21, 24.) According to the State, Quinones' appellate attorney could have filed a C.P.L. § 440 motion containing these allegations as a "supplement to his appeal." *(Id.* ¶ 24.)

Quinones replied that his appellate counsel made known as early as 1997 that they intended to file a C.P.L. § 440 motion alleging ineffective assistance of counsel. (Quinones C.P.L. § 440 Reply Br. at 7 & Exs. C, D, & E.) Further, although a prior appointed appellate attorney had petitioned the court in 1997 for funds to hire an investigator to help prepare the appeal (Quinones C.P.L. § 440 Reply Br. Ex. D), [FN16] Quinones claimed that he only learned in 2002 from a private investigator that Morris had represented him and his brother simultaneously, and that Dennis' 1993 arrest involved a .380 handgun (Quinones 6/26/02 C.P.L. § 440 Aff. ¶J 17, 19,22; Quinones C.P.L. § 440 Br. at 6 n. 20; Quinones C.P.L. § 440 Reply Br. at 10; Dkt. No. 16: Quinones § 460 1st Dep't Br. at 14).

> [FNI6]. The attorney, Lawrence Barocas, retired due to illness within several months of taking on Quinones' case. (Quinones C.P.L. § 440 Reply Br.

> Ex. E.) The First Department refused to appoint Barocas' partner, Sam Schmidt, to continue the appeal. *(Id.)*

Finally, the State asserted that because Quinones fled the scene with the handgun, he could easily have given the gun to his brother Dennis prior to Dennis' arrest six weeks later. (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 22.) Thus, even if a ballistics test proved that the handgun Dennis was caught with matched the handgun that shot Carter, such a finding would not be "dispositive" *(id.),* especially since Quinones' conviction was based on the testimony of two eyewitnesses *(id.* ¶ 23). In reply, Quinones argued that even if Dennis' possession of the murder weapon did not conclusively prove that Dennis, and not Quinones, committed the murder, an unconflicted attorney would have argued the point to the jury in an effort to raise a reasonable doubt regarding Quinones' guilt. (Quinones C.P.L. § 440 Reply Br. at 10.)

The State Court Decisions Denying Quinones' C.P.L. § 440 Motion

On September 18, 2002, the trial court denied Quinones' C.P.L. § 440 motion, adopting virtually wholesale the State's arguments (as well as the State's misspelling of Morris' name as "Morrison"): Although defendant had the opportunity to raise the specific issues contained in the motion on direct appeal, he unjustifiably failed to do so. Moreover, with respect to the defendant's ineffective assistance of counsel claim, the evidence submitted by the People shows that after defendant's brother absconded and was returned to court, he was represented by Victor Dailey Rivera Esq. and not Alvin Morrison [sic] Esq., and that during the sentencing hearing when asked by the Court whether he had anything to say, rather than alerting the court to a possible exculpatory witness and to advise the court of trial counsel's failure to

call such a witness, defendant replied "No."

*15 Lastly, the possibility that the handgun which the defendant's brother was later arrested for illegally possessing, and which defendant contends is the real murder weapon--and his brother the real murderer--is of no consequence since a witness identified the defendant as the shooter, as the person seen speaking with the decedent moments before the murder, and as the person with whom one of the identifying witnesses had a verbal exchange at the crime scene before the murder. This Court has reviewed the defendant's remaining contentions and find[s] them to be without merit.
(Dkt. No.17: 9/18/02 State Court § 440 Decision, record citation omitted.)

On December 12, 2002, the First Department summarily denied leave to appeal, stating that "there is no question of law or fact presented which ought to be reviewed." (Dkt. No. 18: Quinones Mot. to Amend Pet., Ex. A: 1st Dep't 12/12/02 Order.)

Additional Proceedings in This Court

On January *15,* 2003, this Court granted Quinones' request to amend his petition to include the following claim: Defendant Was Deprived Of His Constitutional Right to "Conflict Free" Representation When Attorney C. Morris, Esq., Simultaneously Represented Defendant And His Brother, Dennis Quinones, On Unrelated Charges, Knowing Full Well That The .380 Caliber Handgun Dennis Quinones Was Indicted For In Bronx County May Have Been The Same Weapon Used In The Lamont Carter Murder. (Dkt. No. 18: 1/15/03 Memo Endorsed Order & Quinones 1/8/03 Aff. ¶ 1.) This claim is virtually identical to one of the claims added by way of the Court's June 7, 2002 Order. *(See* pages 20-21 above.)

In its response to Quinones' amended petition, the State repeated its earlier arguments, but assumed for habeas purposes that Dennis' gun was the murder weapon: Although no ballistics comparison was ever made, the People took the position in state court that it made no difference whether [Dennis'] gun was the murder weapon. Thus, this response assumes that a ballistics test would have revealed the gun to have been the one that petitioner used when he shot Carter. (Dkt. No. 20: State Am. Answer ¶ 23 n. 1.)

In his most recent submission to this Court, Quinones claimed for the first time that the photo array depicted not Dennis, but rather "David Quinones," *another* "one of Petitioner's brothers." (Dkt. No. 22: Quinones Traverse Br. at 12.)

On May 20, 2003, this Court issued the following order: The State is to inform the Court ... whether ballistics testing still can be done on Dennis' .380 and the Carter-murder shells, and if so, should complete the tests and inform the Court of the results.... The State is also to provide the Court ... with the photo array pictures of Quinones and his "brother" and any other evidence as to whether that brother whose picture was in the photo array was "Dennis" or "David." (Dkt. No. 23: 5/20/03 Order; *see also* Dkt. No. 24: 5/23/03 Order.)

*16 The State responded by affidavit that "the bullets and shell casings recovered in connection with Lamont Carter's murder had been fired from the gun that Dennis Quinones possessed." (Dkt. No. 25: A .D.A. Axeirod 5/28/03 Aff. ¶ 2.) Further, the State averred that the photo array in question depicted *neither* Dennis *nor* David Quinones: [Alt a pre-trial hearing, the detective who compiled the initial [photo] array testified that he had been informed by another detective that Jorge Vasquez, whose picture was # 4 in the array, was petitioner's brother. The detective also testified that petitioner had never conlirmed that fact (Hearing Transcript at 23-24). I

am informed by Assistant District Attorney Harvey Rosen, who investigated and prosecuted the case, that this belief that Vasquez was related to petitioner was incorrect and that no family member's photograph appeared in that array. Additionally, I obtained Vasquez's arrest record and compared it with the record for Dennis Quinones. These records ... reveal that the two men are not the same. Lastly, while petitioner has claimed that it was not Dennis Quinones' but David Quinones' photograph that appeared in the array, Vasquez's record reveals that he has never used the name Quinones. (A.D.A. Axelrod 5/28/03 Aff. ¶f 3-5.)

A1,TALYSIS

I. *THE AEDPA REVIEWSTANDARD* [FN17]

[FN17]. For additional decisions authored by this Judge discussing the AEDPA review standard in language substantially similar to that in this entire section of this Report & Recommendation, *see* Wilson v. Senkowski, 02 Civ. 0231. 2003 WL 21031975 at *56 (S.D .N.Y. May 7, 2003) (Peck, M.J.); Naranlo v. Filion, 02 Civ. 5449, 2003 WL 1900867 at *5..7 (S.D.N.Y. Apr. 16, 2003) (Peck, M.J.); Hediam v. Miller, 02 Civ. 1419, 2002 WL 3 1867722 at *8.40 (S.D.N .Y. Dec.23, 2002) (Peck, M.J.); Dickens v. Filion, 02 Civ. 3450, 2002 WL 31477701 at *68 (S.D.N.Y. Nov. 6 2002) (Peck, M.J.), report & rec. adopted, 2003 WL 1621702 (S.D.N.Y. Mar. 28,2003) (Cote, D.J.); Figueroa v. Greiner, 02 Civ. 2126,2002 WL 31356512 at *5..6 (S.D.N.Y. Oct. 18, 2002) (Peck, M.J.); Aramas v. Donnelly, 99 Civ. 11306,2002 WL31307929 at *68 (S.D.N.Y. Oct. 15,2002) (Peck, M.J.); Velazguez v. Murray, 02 Civ. 2564,2002 WL 1788022 at *12.. 14 (S.D.N.Y. Aug. 2, 2002) (Peck, M.J.); Solo v. Greiner, 02 Civ. 2129, 2002 WL 1678641 at *6..7 (S.D.N.Y. July24, 2002)

(Peck, M.J.); *Green v. Herbert,* 01 Civ. 11881,2002WL 1587133 at*911 (S.D.N.Y. July 18, 2002) (Peck, M.J.); *Bueno v. Walsh,* 01 Civ. 8738, 2002 WL 1498004 at *10_li (S.D.N.Y. July 12,2002) (Peck, M.J.); *Larrea v. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *14 (S.D.N.Y. May31, 2002) (Peck, M.J.), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6. 2000) (Scheindlin, D.J.); *Jamison v. Berbary,* 01 Civ. 5547, 2002 WL 1000283 at *89 (S.D.N.Y. May 15, 2002) (Peck, M.J.); *C'roinwell v. Keane,* 98 Civ. 0013, 2002 WL 929536 at *12..13 (S.D.N.Y. May 8, 2002) (Peck, M.J.); *Jamison v. Grier,* 01 Civ. 6678, 2002 WL 100642 at 8-9 (S.D.N.Y. Jan. 25, 2002) (Peck, M.J.); *Thomas v. Breslin,* 01 Civ. 6657, 2002 WL 22015 at *4..5 (S.D.N.Y. Jan. 9,2002) (Peck, M.J.); *Thomas v. Duncan,* 01 Civ. 6792,2001 WL 1636974 at * 7 (S.D.N.Y. Dec. 21,2001) (Peck, M.J.); *Rivera v. Duncan,* 00 Civ. 4923, 2001 WL 1580240 at *6 (S.D.N.Y. Dec. 11, 2001) (Peck, M.J.); *Rodriguez v. Lord,* 00 Civ. 0402, 2001 WL 1223864 at *16 *(S.D.N.Y.* Oct. 15,2001) (Peck, M.J.); *James v. People of the State of New York, 99* Civ. 8796, 2001 WL 706044 at *11 (S.D.N.Y. June 8. 2001) (Peck, M.J.), *report & rec.adopted,* 2002 WL 31426266 (S.D.N.Y. Oct. 25,2002) (Berman, D.J.); *Venturav. Artuz,* 99 Civ. 12025,2000 WL 995497 at *5 (S.D.N.Y. July 19. 2000) (Peck, M.J.); *Mendez v. Arluz,* 98 Civ. 2652. 2000 WL 722613 at * 22 (S.D.N.Y. June 6. 2000) (Peck, M.J.), *report & rec. adopted,* 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) (McKenna, D.J.), *affd,* 303 F.3d41 1.417 (2d Cir.2002), *cert. denied,* 123 S.Ct. 1353 (2003); *Fluellen v. Walker,* 97 Civ. 3189,2000 WL 684275 at * 10 (S.D.N.Y. May 25.2000) (Peck, M.J.), *affd,* No. 01-2474,41 Fed. Appx. 497, 2002 WL 1448474 (2d Cir. June 28, 2002), *cert. denied,* 123 S.Ct. 1787 (2003).

Before the Court can determine whether Quinones is entitled to federal habeas relief, the Court must address the proper habeas corpus review standard under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

In enacting the AEDPA, Congress significantly "modifie[dJ the role of federal habeas courts in reviewing petitions filed by state prisoners." *Williams v. Taylor,* 529 U.S. 362, 403, 120 S.Ct. 1495, 1518 (2000). The AEDPA imposed a more stringent review standard, as follows: (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. 2254(d)(l)-(2) *see also, e.g., Eze v. Senkoii'ski,* 321 F.3d 110. 20(2dCir.2003)("AEDPA changed the landscape of federal habeas corpus review by 'significantly curtail [ing] the power of federal courts to grant the habeas petitions of state prisoners." ') (quoting *Lainflesla v. Arluz.* 253 F.3d 151. 155 (2d Cir.2001), *cert. denied,* 535 U.S. 1019,122 S.Ct. 1611 (2002)).

The "contrary to" and "unreasonable application" clauses of 2254(d)(1) have "independent meaning." *Williams v. Taylor,* 529 U.S. at 404-05, 120 S.Ct. at 1519. [FNI8] Both, however, "restrict[] the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams v. Taylor,* 529 U.S. at 412, 120 S.Ct. at 1523. [FN19]1 "That federal law, as defined by the Supreme

Court, may either be a generalized standard enunciated in the [Supreme] Court's case law or a bright-line rule designed to effectuate such a standard **in** a particular context." *Kennaugh v. Miller,* 289 F.3d at 42. "A petitioner cannot win habeas relief solely by demonstrating that the state court unreasonably applied Second Circuit precedent." *Yung v. Walker,* 296 F.3d at 135; *accord, e.g., Del Valle v. Armstrong,* 306 F.3d at 1200.

[FN18]. *Accord, e.g., Jones v. Stinson,* 229 F.3d 112, 119 (2d Cir.2000); *Lurie v. Wittner,* 228 F.3d 113, 125 (2d Cir.2000), *cert. denied,* 532 U.S. 943, 121 S.Ct. 1404 (2001); *Clark v.Stinson,* 214 F.3d 315, 320 (2d Cir.2000), *cert. denied,* 531 U.S. 1116, 121 S.Ct. 865 (2001).

[FN19]. *Accord, e.g., Del Valle v. Armstrong,* 306 F.3d 1197, 1200 (2d Cir.2002); *Yung v. Walker,* 296 F.3d 129, 135 (2d Cir.2002); *Kennaugh v. Miller,* 289 F.3d 36,42 (2d Cir.), *cert. denied,* 123 S.Ct. 251 (2002); *Loliscio v. Goord,* 263 F.3d 178, 184 (2d Cir.2001); *Sellan v. Kuhlman,* 261 F.3d 303, 309 (2d Cir.2001).

*17 As to the "contrary to" clause:
A state-court decision will certainly be contrary **to** [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases.... A state-court decision will also be contrary to [the Supreme] Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent. *Williams* i *Taylor,* 529 U.S. at 405-06, 120 S.Ct. at 15 19-20. [FN2O]

[FN2O]. *Accord, e.g.,* Del Valle v. Armstrong, 306F.3dat 1200; *Yungv. Walker,* 296F.3dat *jj* Kennaugh v. Miller, 289 F.3d at 42; *Loliscio v. Goord,* 263 F.3d at 184; *Lurie v. Wittner,* 228 F.3d at 127-28.

In *Williams,* the Supreme Court explained that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williamsv. Taylor,* 529 U.S. at 413. 120 S.Ct. at 1523. However, "[t]he term 'unreasonable' is ... difficult to define." *Id.* at 410, 120 S.Ct. at 1522. The Supreme Court made clear that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.*[FN21] Rather, the issue is "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor,* 539 U.S. at 409, 120 S.Ct. at 1521. [FN22] The Second Circuit has explained "that while '[s]ome increment of incorrectness beyond error is required the increment need not be great; otherwise, habeas reliefwould be limited to state court decisions so far off the mark as to suggest judicial incompetence." *'gj v. Stinson,* 229 F.3d at 119 (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000)). [FN23] Moreover, the Second Circuit has held "that a state court determination is reviewable under AEDPA if the state decision unreasonably failed to extend a clearly èstablished, Supreme Court defined, legal principle to situations which that principle should have, in reason, governed." *Kennaugh v. Miller,* 289 F.3d at 45 *accord Yungv. Walker,* 296 F.3d at 135. Underthe AEDPA, in short, the federal courts "must give the state court's adjudication a high degree of deference." *Yung v. Walker,* 296 F.3d at 134.

[FN21]. *See also, e.g.,* Eze v. Senkowski, 321 F.3d at 124-25; *Del Valle v. Armstrong,* 306 F.3d at 1200 ("With regard to issues of law, therefore, if the state court's decision was not an unreasonable application of, or contrary to, clearly established federal law as defined by Section 2254(d), we may not grant habeas relief even if in our judgment its application was erroneous.").

[FN22]. *Accord, e.g.,* Eze v. Senkowski, 321 *F.3dat125;Rvanv. Miller,* 303 F.3d231, 245 (2d Cir.2002); *Yung v. Walker,* 296 F.3d at *j.jLolisciov. Goord,* 263 F.3dat *184Lurie v. Wittner,* 228 F.3d at 128-29.

[FN23]. *Accord, e.g., Eze v. Senkowski,* 321 F.3d at 125; *Ryan v. Miller,* 303 F.3d at 245; *Yun v. Walker,* 296 F.3d at 135; *Loliscio v. Goord,* 263 F.3d at 184.

Even where the state court decision does not specifically refer to either the federal claim or to relevant federal case law, the deferential AEDPA review standard applies: For the purposes of AEDPA deference, a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. 2254(d)(1)to the state court's decision on the federal claim--even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.

*18 *Sellan v. Kuhi,nan,* 261 F.3d at 312 *accord, e.g., Cotto v. Herbert,* No. 01-2694. 2003 WL 1989700 at *6 (2d Cir. May 1, 2003); *Eze v. Senkowski,* 321 F.3d at 121; *Ryan v. Miller,* 303 F.3d at 245; *Aeid v. Bennett,* 296 F.3d 58, 62 (2d Cir.), *cert. denied,* 123 S.Ct. 694 (2002);

Jenkins v. Artuz, 294 F.3d 284, 291 (2d Cir.2002) ("In *Sellan,* we found that an even more concise Appellate Division disposition--the word 'denied'-- triggered AEDPA deference."); *Norde v. Keane.* 294 F.3d 401. 410 (2d Cir.2002); *Aparicia v. Artuz,* 269 F.3d 78, 93 (2d Cir.2001). [FN24] "By its terms, 2254(d) requires such deference only with respect to a state-court 'adjudication on the merits,' not to a disposition 'on a procedural, or other, ground.' Where it is 'impossible to discern the Appellate Division's conclusion on [the relevant] issue,' a federal court should not give AEDPA deference to the state appellate court's ruling." *Miranda v.. Bennett,* 322 F.3d 171, 177-78 (2d Cir.2003) (citations omitted). [FN25] Of course, "if there is no [state court] adjudication on the merits, then the pre-AEDPA de novo standard of review applies." *Cotlo v. Herbert,* 2003 WL 1989700 at *7

[FN24]. The Second Circuit "recognize[d] that a state court's explanation of the reasoning underlying its decision would ease our burden in applying the 'unreasonable application' or 'contrary to' tests." *Sellan v. Kzthlrnan,* 261 F.3d at 312. Where the state court does not - explain its reasoning, the Second Circuit articulated the analytic steps to be followed by a federal habeas court: We adopt the Fifth Circuit's succinct articulation of the analytic steps that a federal habeas court should follow in determining whether a federal claim has been adjudicated "on the merits" by a state court. As the Fifth Circuit has explained, "[W]e determine whether a state court's disposition of a petitioner's claim is on the merits by considering: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon

procedural grounds rather than a determination on the merits." *Mercadel v. Cain.* 179 F.3d 271, 274(5th Cir.1999). *Sellan v. Kuhlman,* 261 F.3d at 314 *accord, e.g., Cotlo v. Herbert,* 2003 WL 1989700 at *Eze v. Senkowski,* 321 F.3d at 121-22; *Norde v. Keane,* 294 F.3d at 410; *Aparicio v. Artuz,* 269 F.3d at 93.

[FN25]. The Second Circuit in *Miranda v. Bennett* continued: "Generally, when the Appellate Division opinion states that a group of contentions is either without merit 'or' procedurally barred, the decision does not disclose which claim in the group has been rejected on which ground. If the record makes it clear, however, that a given claim had been properly preserved for appellate review, we will conclude that it fell into the 'without merit' part of the disjunct even if it was not expressly discussed by the Appellate Division." *Id.* at 178.

II. *THE STRICKLAND V WASHINGTON STANDARD ON INEFFECTIVE ASSISTANCE OF COUNSEL [*FN26]

[FN26]. For additional decisions authored by this Judge discussing the *Strickland v. Washington* standard for ineffective assistance of counsel in language substantially similar to this section of this Report & Recommendation, *see Hedia,n v. Miller,* 02 Civ. 1419, 2002 WL 31867722 at *14.46 (S.D.N.Y. Dec. 23, 2002) (Peck, M.J.); *Rosario v. Bennett,* 01 Civ.7142, 2002 WL 31852827 at *26.28 (S.D .N.Y. Dec. 2Q. 2002) (Peck, M.J.); *Dickens v. Filion,* 02 Civ. 3450, 2002 WL 31477701 at *13.44 (S.D.N.Y. Nov. 6, 2002) (Peck, M.J.), *report &rec. adopted,* 2003 WL 1621702 *(S.D.N.Y.* Mar. 28, 2003) (Cote, D.J.); *Aramas v. Donnelly, 99* Civ. 11306,2002 WL 31307929 at *9 il *(S.D.N.Y.* Oct. 15, 2002) (Peck, M.J.); *Larrea v. Bennett,* 01 Civ. 5813, 2002 WL

1173564 at *1619 (S.D.N.Y. May 31, 2002) (Peck, M.J.), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6,2002) (Scheindlin, D.J.); *Jamison v. Berbary,* 01 Civ. 5547, 2002 WL 1000283 at *9.41 (S.D.N.Y. May 15, 2002) (Peck, M.J.); *C'romwell* V. *Keane,* 98 Civ. 0013, 2002 WL 929536 at *15.47 (S.D.N.Y. May 8, 2002) (Peck, M.J.); *Rivera v. Duncan,* 00 Civ. 4923, 2001 WL 1580240 at *9 (S.D.N.Y. Dec. 11, 2001) (Peck, M.J .); *Ennis v. Walker.* 00 Civ. 2875, 2001 WL409530 at *15..16(s.D.N.y. Apr. 6, 2001) (Peck, M.J.); *Fluellen v. Walker,* 97 Civ. 3189, 2000 WL 684275 at *11 (S.D.N.Y. May 25, 2000) (Peck, M.J.), *affd,* No. 01-2474. 41 Fed. Appx. 497, 2002 WL 1448474 (2d Cir. June 28, 2002), *cert. denied,* 123 S.Ct. 1787 (2003); *Dukes v. McGinnis,* 99 Civ. 9731,2000 WL 382059 at *8 (S.D.N.Y. Apr. 17. 2000) (Peck, M.J.); *Cruz v. Greiner,* 98 Civ. 7939, 1999 WL 1043961 at *16 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); *Lugo v. Kuhlmann,* 68 F.Supp.2d 347, 370 (S.D.N.Y.1999) (Patterson, D.J. & Peck, M.J.); *Santos v. Greiner,* 99 Civ. 1545. 1999 WL 756473 at *7 (S.D.N.Y. Sept. 24, 1999) (Peck, M.J.); *Franzav. Stinson,* 58 F.Supp.2d 124, 133- 34) (S.D.N.Y.1999) (Kaplan, D.J. & Peck, M.J.); *Torres v. Irvin,* 33 F.Supp.2d 257, 277 (S.D.N.Y.1998) (Cote, D.J. & Peck, M.J.); *Boyd v. Hawk,* 965 F.Supp. 443, 449 (S.D.N.Y.1997) (Balls, D.J. & Peck, M.J.).

In *Stricklandv. Washington.* 466 U.S. 668, 104 S.Ct. 2052 (1984), the Supreme Court announced a two-part test to determine if counsel's assistance was ineffective: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064. This

performance is to be judged by an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. at .9_4j *accord, e.g., Belly. Cone,* 122 S.Ct. 1843, 1850 (2002).
Judicial scrutiny of counsel's perfonnance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickiandv. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted). [FN27]

[FN27].*Accord, e.g., Belly. Cone,* 122 S.Ct. at 1852; *Aparicio v. Artuz,* 269 F.3d 78, 95 (2d Cir.2001); *Sellan v. Kuhirnan,* 261 F.3d 303, *315* (2d Cir.2001).

Second, the defendant must show prejudice from counsel's performance. *Strickland v. Washington, 466* U.S. at 687, 104 S.Ct. at 2064. The "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at *695,* 104 S.Ct. at 2068-69. Put another way, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. [FN28]

[FN28]. *See also, e.g., Bell v. Cone,* 122 S.Ct. at 1850: *Aparicio v. Artuz,* 269 F.3d at 95; *Sellan v.*

Kuhiman, 261 F.3d at 315; *DeLuca v. Lord*, 77 F.3d 578, 584 (2d Cir.), *cert. denied*, 519 U.S. 824, 117 S.Ct. 83 (1996). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Stricklandv. Washington*, 466 U.S. at 694. 104 S.Ct. at 2068. The phrase "reasonable probability," despite its language, should not be confused with "probable" or "more likely than not." *Strickler v. Greene*, 527 U.S. 263, 289-91, 119 S.Ct. 1936, 1952- 53 (1999); *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1565-66 (1995); *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998 (1986) ("a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland"); Strickland v. Washington.* 466 U.S. at 694, 104 S.Ct. at 2068 ("The result ofa proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). Rather, the phrase "reasonable probability" seems to describe a fairly low standard of probability, albeit somewhat more likely than a "reasonable possibility." *Strickler v. Greene*, 527U.S.at291, 119 S.Ct. at 1953 *cf id.* at 297-301, 119 S.Ct. at 1955-58 (Souter, J., concurring & dissenting) (arguing that any difference between "reasonable probability" and "reasonable possibility" is "slight").

*19 The Supreme Court has counseled that these principles "do not establish mechanical rules." *Stricklandv. Washington*, 466 U.S. at *696*, 104 S.Ct. at The focus of the inquiry should be on the fundamental fairness of the trial and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. *Id.*

Any counsel errors must be considered in the "aggregate" rather than in isolation, as the Supreme Court has directed courts "to look at the 'totality of the evidence before the judge orjury." *'Lindstadt v. Keane,* 239 F.3d 191, 199 (2d Cir.20013 (quoting *Strickland v. Washington,* 466 U.S. at 695- 96, 104 S.Ct. at 2069) *accord, e.g., Rodriguez v. Ho/ce,* 928 F.2d 534, 538 f Cir.199l).

The Supreme Court also made clear that "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." *S/rick/andy. Washington, 466* U.S. at 697, 104 S.Ct. at 2069. [FN29]

> [FN29]. *Accord, e.g., Smith v. Robbins,* 528 U.S. 259, 286 n. 14, 120 S.Ct. 746, 764 n. 14 (2000).

In addition, the Supreme Court has counseled that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington,* 466 U.S. at 690-91, 104 S.Ct. at 2066. [FN30]

[FN3O]. *See also, e.g., Enle v. Isaac,* 456 U.s. 107, 134, 102 S.Ct. 1558, *1575* (1982) ("We have long recognized ... that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."); *Jackson v. Leonardo,*

> 162 F.3d 81, 85 (2d Cir.1998') ("In reviewing *Strickland* claims, courts are instructed to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and that counsel's conduct was not the result of error but derived instead from trial strategy. We are also instructed, when reviewing decisions by counsel, not to 'second-guess reasonable professional judgments and impose on ... counsel a duty to raise every "colorable" claim' on appeal.") (citations omitted); *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.) (a reviewing court "may not use hindsight to second-guess [counsel's] strategy choices"), *cert. denied,* 513 U.S. 820. 115 S.Ct. 81(1994).

As the Second Circuit noted: "The *Stricklandstandard* is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Lindstadtv. Keane,* 239 F.3d at 199.

For purposes of this Court's AEDPA analysis, "the *Strickland* standard... is the relevant 'clearly established Federal law, as determined by the Supreme Court of the United States." *'Aparicio v. Artuz,* 269 F.3d at 95 & n. (quoting 28 U.S.C. 2254(dXl)). [FN31] "For AEDPA purposes, a petitioner is not required to further demonstrate that his particular theory of ineffective assistance of counsel is also 'clearly established." *Aparicio v. Artuz,* 269 F.3d at *95* n. 8. "For [petitioner] to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under 2254(d)(l), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly.... Rather, he must show that the [First Department] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone,* 122 S.Ct. at 1852.

[FN31]. *See also, e.g.,* Bell v. Cone, 122 S.Ct. at *1852;Selianv. Kuhhnan,* 261 F.3dat315.

III. *QUINONES' CONFLICT OF INTEREST CLAIM ISNOTPROCEDURALLYBARRED OR BARRED BY LACHES*

A. *State Procedural Bar*

*20 It is unclear whether the C.P.L. § 440 court held that Quinones' conflict of interest claims were procedurally barred, or merely that they were not credible, on two bases. First, the § 440 court noted that "during the sentencing hearing when asked by the Court whether he had anything to say, rather than alerting the courtto apossible exculpatory witness and to advise the court of trial counsel's failure to call such a witness, defendant replied 'No." ' (Dkt. No.17: 9/19/02 State Court § 440 Decision at 2.) Second, the § 440 court held that "[a]lthough defendant had the opportunity to raise the [conflict of interest claims] on direct appeal, he unjustifiably failed to do so." *(Id.)*

The State has effectively waived any procedural bar by failing to argue in its opposition to Quinones' habeas petition *(see* Dkt. No. 20: State Am. Answer) that the § 440 decision rested on an adequate and independent state ground. *See, e.g., Collins v. Travis,* 00 Civ. 3746, 2000WL 1476664at*l0n. 13 (S.D.N.Y. Oct. 5,2000) (Peck, M.J.) ("The government's brief did not argue that the First Department's decision rested on an independent and adequate state ground, and this Court declines to raise the issue *sua sponte.* "). Even were this Court inclined to consider the matter *sua sponte,* however, the two grounds asserted by the § 440 court are not adequate procedural bars.

The "adequate and independent state ground doctrine applies on federal habeas," such that "an adequate and independent

finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto,' or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage ofjustice." *'Harris v. Reed,* 489 U.S. *255,* 262, 109 S.Ct. 1038, 1043 (1989) (citations omitted); *see also, e.g., Roberts v. Batista,* 01 Civ. *5264,* 2003 WL 1900866 at *7..8 & n. 8 (S.D.N.Y. Apr. 16,2003) (Peck, M.J.) (& cases cited therein). A state court's finding of procedural default constitutes an "adequate" ground only "if there is a 'fair and substantial' basis in state law for the state court's determination." *Garcia v.. Lewis.* 188 F.3d 71. 78 (2d Cir. 1999). The procedural rule must be "'strictly or regularly followed."' *Wedra v. Lefevre,* 988 F .2d 334, 339 (2d Cir. 1993) (quoting *Johnson v. Mississippi,* 486 U.S. 578, 587, 108 S.Ct. 1981, 1987 (1988)). "[Ojnly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review" in federal court "of a federal constitutional claim." *Ford v. Georgia,* 498 U.S. 411, 423-24, 111 S.Ct. 850, 857 (1991) (quoting *James v. Kentucky.* 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-37(1984)) *see Hathorn v Lovorn,* 457 U.S. 255, 263, 102 S.Ct. 2421, 2426 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.").

*21 **The** two possibly procedural grounds proffered by the § 440 court fail to satisfy the adequacy standard. First, a litigant does not waive an actual conflict of interest claim (of which he was unaware) by failing himself to raise the issue at trial, *pro se,* as such a rule would effectively require represented defendants to act as their own trial counsel. Although C.P.L. 440.10(3)(a) provides that a court "may deny" a § 440 motion where "facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue

upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently detennined upon appeal," this provision expressly "does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right." C.P.L. §440.10(3)(a) *see* *Bolling v. Slinson,* No. 97-CV-6721, 1999 WL 287733 at *3 (E.D.N.Y. May 5. 1999) (State court held petitioner's ineffective counsel claim procedurally barred under C.P .L. 440.10(3) because petitioner failed to raise the claim at trial. Habeas court held the procedural bar was not an adequate and independent state ground because, *inter alia,* (1) "[djuring trial petitioner clearly could not object to his trial counsel's assistance," and (2) C.P.L. 440.10(3)(a) "does not apply to a motion based upon deprivation of the right to counsel at the trial."). Moreover, the Supreme Court has held that "[ijn order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuylerv. Sullivan,* 446 U.S. 335, 348-49. 100 S.Ct. 1708, 1718 (1980), [FN32] implying that conflicts need not be raised at trial. [FN33] Quinones thus did not waive his conflict claim by failing to raise it, *pro se,* at trial or at sentencing.

[FN32]. *Accord, e.g., Strouse v. Leonardo,* 928 F.2d 548, 552 (2d Cir.1991) *Martinez v. Senkowski,* No. 97 CV 0624, 2000 WL 33767628 at * 4 (N.D.N.Y. Jan. 7, 2000); *J-funte v. Keane,* No. CV 97-1 879, 1999 WL 754273 at *7 (E.D.N.Y. Aug. 24, 1999) (Raggi, D.J.).

[FN33]. As noted below, Quinones asserts that he did not even know at the time of trial or direct appeal that his trial counsel was conflicted. *(See* pages 24 n. 13, 27 above.)

Second, under New York law, ineffective counsel claims involving matters outside the record--including claims of conflict of interest--"must be pursued by way of a CPL 440.10 motion." *People v. Kaz,nirski,* 299 A.D.2d 826. 827, 749 N.Y.S.2d 194. 195 (4th Dept 2002), *appeal denied,* 99 N.Y.2d 583, 755 N.Y.S.2d 719 (2003); *People v. Mora,* 290 A.D.2d 373, 373-74, 737 N.Y.S.2d 71, 72 (1st Dep't) ("Defendant's claim that he was denied the effective assistance of counsel due to a purported conflict of interest is based on factual allegations dehors the record that would require a CPL 440.10 motion ...."), *appeal denied,* 98 N.Y.2d 639, 744 N.Y.S.2d 768 (2002). [FN34] Because the conflict of interest claim in this case is based on evidence outside the trial record, Quinones had no choice but to bring his conflict claim under C.P.L. 440.10 rather than on direct appeal. His failure to raise the conflict claim on direct appeal therefore cannot be considered an "adequate" state ground barring this Court's review on the merits. *See, e.g., Senor v. Senkowski,* No. 97-CV-4929, 1999 WL 689477 at *3.. 5 (E.D.N.Y. Aug. 31, 1999) (state procedural bar did not constitute adequate and independent state ground, where the § 440 court found ineffective counsel claims barred under 5 440.10(2)(c) for failure to raise the claims on direct appeal; habeas court held that "petitioner properly concluded that he should reserve his ineffective assistance claim for a § 440 motion rather than pursue it on direct appeal").

> [FN34]. *Accord, e.g., People v. Englert,* 285 A.D.2d 987. 988, 727 N.Y.S.2d 680, 681(4th Dept) ("Defendant's contention that defense counsel had a conflict of interest 'is based on material dehors the record, and thus the appropriate procedural vehicle is a motion pursuant to CPL 440.10' ...."), *appeal denied,* 97 N.Y.2d 655, 737 N.Y.S.2d 56 (2001); *People v. Joseph,* 266 A.D.2d 237, 238, 697 N.Y.S.2d 659, *659* (2d Dep't 1999) ("The defendant contends that he was denied the effective assistance of counsel

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because of certain alleged conflicts of interest and counsel's alleged failure to gather exculpatory evidence. However, these claims concern matters dehors the record and thus are not reviewable on appeal ...."), *appeal denied,* 4 N.Y.2d 881. 705 N.Y.S.2d 13 (2000). *See, e.g., Peoplev. Brown,* 45N.Y.2d 852, 853-54, 410 N.Y.S.2d 287, 287 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record ... [and] in the typical case it would be better ... that an appellate attack on the effectiveness of counsel be ... brought under CPL 440.10."); *People v. Graham,* 298 A.D.2d 766. 766-67, 748 *N.Y.S.2d* 704, 704 (3d Dept 2002) ("To the extent that [judge's conflict of interest] was brought to defense counsel's attention by defendant before County Court, it is a matter outside the present record and, therefore, defendant's proper recourse [for ineffective assistance claim] is a motion pursuant to 440.10...."); *People v. Mendoza,* 298 A.D.2d 532, 533, 748 N.Y.S.2d 666. 666-67 (2d Dept) (Because "defendant's [ineffective counsel] claim involves affidavits and other matters dehors the record which could not be reviewed on direct appeal ... defendant was not procedurally barred from moving pursuant to CPL 440.10 to vacate the judgment of conviction."), *appeal denied,* 99 N.Y.2d 561, 754 N.Y.S.2d 213 (2002); *People v. Delgado,* 292 A.D.2d 212: 213, 741 N.Y.S.2d 2, 4 (1st Dep't) ("[D]efendant's claim that trial counsel's decision to waive ... two issues constituted ineffective assistance raises questions of strategy that would require a 440.10 motion in order to expand the record."), *appeal denied,* 98 N.Y.2d 696, 747 N.Y.S.2d 414 (2002); *People v. Taborn,* 292 A.D.2d 200,201. 738 N.Y.S.2d216, 216 (1st Dep't) ("Since defendant's ineffective assistance claim rests largely on allegations dehors the record concerning matters of strategy, preparation of witnesses and

consultations between defendant and counsel, it would require a CPL 440.10 motion ...."), *appeal denied,* 98 N.Y.2d 713, 749 N.Y.S.2d 11(2002); *People v. Delarosa.* 287 A.D.2d 735, 736, 732 N.Y.S.2d 108. 110 (2d Dept 2001) (claim that trial counsel was ineffective for failing to serve a timely alibi notice involves "matters dehors the record which could not be reviewed on direct appeal" and, therefore, should not have been held procedurally barred under C.P.L. 440.l0(2)b)); *People v. Brown,* 258 A.D.2d 354, 354-55, 685 N.Y.S.2d 665, 666 (1st Dep't) ("Since defendant failed to raise his ineffective assistance of counsel claims via a CPL 440.10 motion, his claims are not reviewable on direct appeal because they are based on facts dehors the record and counsel has had no opportunity to explain his trial tactics ...."), *appeal denied,* 93 N.Y.2d 1001, 695 N.Y.S.2d 747 (1999); *People v.Hammock, 255* A.D.2d *957, 958.* 681 N.Y.S.2d 184, 185 (4th Dep't 1998) ("To the extent that defendant's contention concerning ineffective assistance of counsel arises from matters outside the record, the facts underlying that contention should be developed through a postjudgment motion under CPL article 440 ...."), *appeal denied,* 2. N.Y.2d 899, 689 N.Y.S.2d 711 *(1999). See also, e.g., J-fernandez v. Lord,* 00 Civ. 2306, 2000 WL 1010975 at *3 & n. 2 (S.D.N.Y. July 21, 2000) (Peck, M.J.) (citing cases).

*22 A more difficult issue is whether Quinones waived the conflict of interest claim by not asserting it until both attorney Morris and his brother Dennis were dead. *(See* Dkt. No. 20: State Am. Answer ¶ 28.) The State's habeas opposition papers assert this "laches" defense under federal law (State Am. Answer ¶ 28, citing *Brecht v. Abrahainson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 1721 (1993)), andthe Courtthereforeturns to that issue.

B. *The State Has Not Proved A Laches Defense, Especially Prejudice*

The Second Circuit has held that despite passage of the AEDPA one-year statute of limitations, 28 U.S.C. 2244(d)(1), habeas petitions from state court convictions continue to be governed by the equitable doctrine of laches. *See* *Ross v. Artuz*, 150 F.3d **97.** 103 (2d Cir.1998) ("We note that nothing in this opinion retreats from our observation in *Peterson Iv. Demskie* 1. 107 F.3d [921, 93 [2d Cir.1997], that the fact that a petition is not time-barred by AEDPA does not, in appropriate factual circumstances, preclude a dismissal of the petition as unduly delayed pursuant to Habeas Rule 9(a)."). Thus, even claims found timely under the one-year AEDPA statute of limitations may be denied on laches grounds. *See, e.g.*, *Cotto v. Lord*, *99* Civ. 4874, 2001 WL 21246 at *5 (S.D.N.Y. Jan. *9*, 2jj, *affd*, No. 01-2056, 21 Fed. Appx. 89, 90, 2001 WL 14123 50 at *1 (2d Cir. Nov. 8,2001); *Dumas v. Kelly*, 105 F.Supp.2d 66. 69 (E.D.N.Y.2000); *Fiteroa v. Portuondo*, 96 F.Surp.2d 256. 278 n. 18 (S.D.N.Y. *1999).* Rule 9(a) of the Rules Governing 2254 Proceedings in United States District Courts provides: Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise ofreasonable diligence before the circumstances prejudicial to the state occurred. 28 U.S.C. foil. 2254 (2003).

"Rule 9(a) has been narrowly construed," such that the State faces a " 'heavy burden" ' in proving its laches defense. *E.g.*, *Cotlo v. Lord.* 2001 WL 21246 at *6. *see also, e.g.*, *Pacheco v. Artuz*, **97** Civ. 3171, 2001 WL 1134864 at * 4 (S.D.N.Y. Sept. 18. 2001); *Dunias v. Kelly*, 105 F.Supp.2d at 69-70. The State "must: (1) make a particularized showing of prejudice; (2) show that the prejudice resulted from the

petitioner's delay in filing a petition; and (3) show that the petitioner has not acted with reasonable diligence." *Pacheco v. Artuz*, 2001 WL 1134864 at *4 *accord, e.g., Cotto v. Lord*, 2001 WL 21246 at *6: *Dumas v. Kelly*, 105 F.Supp.2d at 69-70; *Fiueroa v. Portuondo, 96* F.Supp.2d at 278. [FN35] "If the respondent [State] fails to establish any one of these elements, its Rule 9(a) motion fails." *Dumas v. Kelly*, 105 F.Supp.2d at 70.

> [FN35]. *See also, e.g., Carmona v. Attorney General, 96* Civ. 8045, 1997 WL 876737 at *5 (S.D.N.Y. Oct. 7. 1997), *report & rec. adopted.* 1998 WL 213781 at *3 (S.D.N.Y. Apr. 29. 1998); *Hughes v. Irvin*, 967 F.Supp. 775, 779 (E.D.N.Y.1997); *Hodge v. Walker, 95* Civ. 2873. 1996 WL 363181 at *2 (S.D.N.Y. July 1, *1996), report & rec. adopted, 1996* WL 591247 (S.D.N.Y. Oct. 11, *1996); Moseley v Scully*, 908 F.Supp. 1120, *1130(E.D.N.Y.1995), affd*, 104 F.3d356(2d Cir. 1996).

*23 The State must prove that prejudice was caused by petitioner's delay, and not "the 'mere passage of time alone." ' *Pacheco v. Artuz*, 2001 WL 1134864 at *4. *see, e.g., Hodge v. Walker*, 1996 WL 363181 at *3 (dates when defense counsel died "are significant because they relate to whether the prejudice faced by respondent is attributable to petitioner's delay."). [FN36] Moreover, " '[p]rejudice to the state may not merely be presumed ... from the absence of a transcript or of witnesses necessary to recount the details of [a] proceeding." ' *Cotto v. Lord*, 2001 WL 21246 at *6. Rather, the state" 'must actually be disadvantaged by the absence of such resources in responding to the particular allegations or theories asserted by [the] petitioner as grounds for habeas corpus." *'Id.; accord, e.g., Pacheco v. Artuz*, 2001 WL 1134864 at *4 [FN37] Finally, the claim of prejudice applies only to the inability to defend the habeas corpus petition, not to the difficulty of retrying the petitioner. *See*

Vasguez v. Hille,, 474 U.S. 254, 265. 106 S.Ct. 617, 624 (1986) ("Congress has not seen fit ... to provide the State with an additional defense to habeas corpus petitions based on the difficulties that it will face if forced to retry the defendant."); *Figueroa v. Portuondo,* 96 F.Supp.2d at 279 ("The State, if it claims prejudice, must show prejudice in terms of experiencing difficulty in responding to the petition, and not to the potential of retrying the Petitioner."). [FN38]

{FN36]. *See also, e.g., Cottoi Lord,* 2001 WL 21246 at *6. *Figueroa v. Portuondo, 96* F. Suup.2d at 278 ("Significantly, delay alone is not a bar to relief."); *Hughes v.. Irvin,* 967 F.Supp. at 774; *Moseiey v. Scully,* 908 F.Supp. at 1130.

[FN37]. The grounds most often troublesome to the courts are ineffective counsel [and four other enumerated grounds.] ... When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead.... As a consequence, there is obvious difficulty in investigating petitioner's allegations. Advisory Committee Notes to Habeas Rule 9(a).

[FN38]. *Accord, e.g., Dumas v. Kelly,* 105 F.Supp.2d at 70; *Hodge v. Walker,* 1996 WL 363 181 at *2. *Norwoodv. Hanslrnaier,* No. 93 CV 3748, 1998 WL 178857 at *2 (E.D.N.Y. Feb. 24, 1998).

As to the causation element: "'At a minimum, [the causation element] requires the state to establish that if [petitioner] had filed his habeas petition at some earlier time the evidence the state says it has lost would have been available.' For instance, the state cannot base its prejudice claim on the death of a key

witness if that death occurred the day after the petitioner's state court trial." *Durnas v. Kelly*, 105 F.Siipp.2d at 70 (citation omitted, brackets in original).

Once the State has satisfied the elements of prejudice, causation, and unreasonable delay, the burden shifts to the petitioner to rebut the claims. *See, e.g., Rideau v. Whitley*, 237 F.3d 472, 479 (5thCir.2000), *cert. denied*, 533 U.S. 924, 121 S.Ct. 2539 (2001); *Hughes v. Irvin*, 967 F.Supp. at 779. [FN39]

> [FN39]. Certain decisions seem to hold that, rather than requiring the State to prove lack of diligence on the petitioner's part, the State need merely prove prejudice and causation, and the petitioner must then rebut the claim with evidence of reasonable diligence. *See, e.g., Moseley v. Scully*, 908 F.Supp. at 1130 ("If the state does establish prejudice resulting from the petitioner's delay, the burden shifts to the petitioner to either successfully refute the state's assertion of prejudice or show that the delayed petition is 'based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.' "). Such a distinction is immaterial in this case.

The laches "doctrine is 'permissive rather than mandatory, allowing a district court to exercise discretion to entertain an application, even where the state has made the required showing of delay and prejudice.' " *Pacheco v. Artuz*, 2001 WL 1134864 at *4 (quoting *Cotto v. Lord*, 2001 WL21246 at *5') As then District Judge Sotomayor explained, the defense should be applied "flexibly ... to prevent a petitioner from unfairly disadvantaging the state by delaying adjudication of his habeas claims until witnesses are unavailable, memories stale, and evidence difficult to produce. The ultimate concern

of this rule is that adjudications under a habeas petition be fair and accurate." *Rodriu ez v. Artuz,* 990 F.Supp. 275.279-80 (S.D.N.Y.), *affd,* 161 F.3d 763 (2d Cir.1998).
'[L]apses of time that affect the state's ability, but that do not make it "virtually impossible" for the state to respond, [do not] require dismissal." ' *Rideau v. Whitley,* 237 F.3d at 478.

*24 The State asserts that Quinones unjustifiably delayed raising the conflict of interest claim until May 23, 2002--nearly seven years after his July 10, 1995 sentencing--thus prejudicing the State's habeas defense because of the deaths of attorney Morris and brother Dennis:
Petitioner's task of satisf'ing his burden of proof is further complicated by his decision [not] to raise his conflict allegation until seven years after his conviction. Of course, this timing renders his claims suspect, since it appears that he waited until both [Dennis] and Morris had passed away to level his accusations. Neither man is available to testify as to whether [Dennis] told Morris about his alleged complicity in the Carter murder and thus neither man can refute petitioner's claims. Petitioner also knows that he may implicate his brother in the murder charge with impunity, since his brother can no longer suffer ramifications, such as apossible indictment for the murder charge, from petitioner's post-conviction strategy. Given the lengthy delay, this Court could fairly resolve the claim by rejecting it on grounds of laches, *see* *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710,1721 (1993). Atthe very least, petitioner's claims must be viewed skeptically, with all factual inferences drawn in favor of the People. (Dkt. No. 20: State Am. Answer ¶ 28.)
[FN4O] *See* *Cotto v. Lorc* 2001 WL 21246 at *6 ("Where a petitioner asserts an ineffective assistance of counsel claim, the testimony of the attorney alleged to have rendered ineffective assistance is relevant and the death of that attorney may result in prejudice."); *Hode v. Walker,* 95 Civ. 2873, 1996 WL 591247 at *2 (S.D.N.Y. Oct. II, 1996) (habeas petition dismissed based on federal laches defense,

where petitioner pleaded guilty in 1967, and later claimed ineffective counsel based on alleged out-of-court statements, but petitioner failed to show why he did not bring habeas petition by 1971, when one trial counsel died, 1987, when the other counsel died, or 1991, when the trial judge died).

> [FN4O]. This Court would add that it is now impossible to determine from Morris whether, out of familial loyalty, Quinones told Morris not to accuse Dennis of the murder.

As to the reasonableness of Quinones' delay in raising the conflict claim, Quinones asserts that he did not learn until 2002, when he hired a private detective, that Dennis had been arrested for possession of a .380 caliber handgun. [FN4I] *(See* Dkt. No. 22: Quinones Traverse at 7-8, 11-12.) The State has not shown that Quinones knew this earlier, although it can be argued that Quinones should have known of Dennis' arrest and Morris' representation of Dennis, given that (1) Dennis and Quinones were brothers, and (2) according to Quinones, Dennis suggested to Quinones' family that they hire Morris to represent Quinones *(see* page 24 n. 13 above). In addition, in 1997, Quinones' then-appellate counsel sought leave from the First Department for funds to hire an investigator (Dkt. No. 13: Quinones C.P.L. § 440 Reply Br. Exs. D-E; *see* page 27 above), presumably to make the same investigations that Quinones' investigator made in 2002. Indeed, by April 1997, Quinones had obtained an allegedly exculpatory affidavit from Mr. Alcili, who Quinones knew had not been called as a defense witness at trial by Morris. *(See* Dkt. No. 20: State Am. Appendix: Quinones C.P.L. § 440 Motion Ex. G: Akili Aff.) Thus, "by the exercise of reasonable diligence," perhaps Quinones should have known all relevant information about his conflict claim at the time of his trial or at least by 1997 when he tried to investigate matters.

[FN41]. As noted above (page 24 n. 13), it is unclear whether Quinones also asserts that he did not know (1) that Dennis had been arrested for possession of a handgun (as opposed to not knowing that Dennis had been arrested for possession of a ***.380*** handgun), or (2) that Morris had previously represented Dennis.

*25 Even were the Court to find Quinones' delay unreasonable (and it is not at all clear that the State carried its burden on this point), the State clearly has failed to prove that any delay prejudiced the State's response to Quinones' habeas petition. Morris is alleged to have died no later than September 5, 1996 (A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 17 & Ex. A)--i.e., only fourteen months after Quinones' sentencing. [FN42] Any delay *after* Morris' death is, of course, irrelevant to the prejudice question. Thus, in order to prove prejudice, the State would have to show that Quinones unjustifiably delayed by failing to file his federal habeas petition *before* Morris' death in September 1996. The State has not done so given (1) the realities of New York State practice, since Quinones' direct appeal was not even filed at that time, (2) Quinones' inability to bring a federal habeas petition until he exhausted state remedies, [FN43] and (3) the heavy burden the State must bear to prove laches. *See, e.g., Walters v. Scott,* 21 F.3d 683, 688 (5th Cir.1994) ("Assuming *arguendo* that the death of the court reporter and unavailability of records is construed as prejudicial to the state, the state bears the further burden of proving that [petitioner's] delay in filing his habeas petition caused those sources of evidence to be lost. At a minimum, this requires the state to establish that if [petitioner] had filed his habeas petition at some earlier time, the evidence the state says it has lost would have been available.... The court reporter may have died the day after [petitioner's] trial concluded, in which case the reporter's unavailability would certainly not be attributable to [petitioner's] delay in bringing his habeas petition."); *Hill* V. *Linahan,* 697 F.2d 1032, 1036 (11th

Cir.1983) ("[Sjince respondent does not disclose the date of [petitioner's counsel's] death, he has not demonstrated that [petitioner's] counsel would have been available if [petitioner] had brought his petition within a 'reasonable' period of time."); *Cotto v. Lord*, 2001 WL 21246 at *6 (laches defense denied: "when trial counsel was contacted about the petitioner's case in 1993, three years after the end of the petitioner's direct appeal, trial counsel did not remember much about the case and had already thrown out all his files ..., and it is not clear that his testimony would have been helpful to the respondent if this petition had been filed prior to his death"); *Duinas v. Kelly*, 105 F.Supp.2d at 70 (*Dictum:* "if the respondent fails to make the required showing of prejudice, it is irrelevant whether the petitioner was diligent or not in filing his habeas petition"; "For instance, the state cannot base its prejudice claim on the death of a key witness if that death occurred the day after the petitioner's state court trial ."); *Brewster v. Kirby*, 954 F.Supp. 1155, 1159 (N.D.W.Va.1997) (rejecting laches defense because, *inter* alia, "the presiding trial judge ... died in the five-year interval between petitioner's June 1975 conviction and the September 1980 hearing on remand ...; therefore, any prejudice to the respondent as a result of [the judge's] death is not caused by any alleged delay in bringing the instant petition").

> [FN42]. The State has offered no evidence, admissible or otherwise, establishing Morris' date of death. Because the State bears the burden of proof as to prejudice, and since the State does not dispute Quinones' allegations regarding Morris' date of death, the Court will assume that Morris died some time before September 1996. *C'f Dumas v. Kelly*, 105 F.Supp.2d at 70 n. 3. Indeed, the Court notes that Quinones' Traverse puts Morris' death in 1995 (obviously, the second half of 1995). (*See* Dkt. No. 22: Quinones Traverse at 9.)

[FN43]. Even if delay in bringing state court proceedings could be a basis for a laches claim here, which the Court need not decide, the State's evidence at best leads to the conclusion that Quinones or his appointed state appellate counsel knew or suspected this issue in late 1997 when they sought funds to hire an investigator. *(See* page 27 above.) Morris, however, already was dead by that time. Thus, any post-1997 delay in bringing state (or federal) proceedings could not have prejudiced the State. *f Cotto v. Lord,* 2001 WL 21246 at *7 (finding that petitioner was reasonably diligent under Rule 9(a) in filing state collateral proceedings and federal habeas petition several years after conclusion of direct appeal, given that, *inter alia,* "[a]fter the conclusion of her direct appeal in 1990, the petitioner had no legal assistance and was acting pro se for a number of years").

*26 Nor can the State prove laches with respect to Dennis' testimony. The State correctly argues that after Dennis died, Quinones could "implicate his brother in the murder charge with impunity." (State Am. Answer ¶ 28.) "The defense that the crime was committed by someone else who is unfortunately dead has traditionally been met with skepticism." *People v. Simon,* 75 A.D.2d 516, 516, 426 N.Y.S.2d 753, 754 (1st Dep't 1980). However, the issue here is not whether Quinones' conflict claim should be viewed with skepticism based on its tinting, but whether the State's ability to respond to the habeas petition was prejudiced by Quinones' delay. The only colorable argument is that Dennis is now unavailable to rebut Quinones' theory that Dennis told Morris that he killed Carter. The State, however, has offered no evidence establishing the date of Dennis' death. [FN44]

[FN44]. The record reveals only that Dennis was sentenced on the gun charge on October 9, 1997, over

two years after Quinones' July 10, 1995 sentencing. (Dkt. No. 13: A.D.A. Rosen 9/2/02 C.P.L. § 440 Opp. Aff. ¶ 18 & Ex. B.)

The State's federal laches defense therefore should be denied.

IV. *QUINONES' CONFLICT OF INTEREST CLAIM SHOULD BE DENIED ON THE MERJTS*

A. *Applicable Legal Principles*

'A defendant's Sixth Amendment right to effective assistance ofcounsel includes the right to representation by conflict-free counsel." ' *United States v. Schwarz,* 283 F.3d76, 90 (2d Cir.2002) (quoting *United States v. Biau,* 159 F.3d 68, 74 (2d Cir.1998)). [FN45] "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway v. Arkansas,* 435 U.S. 475, 490, 98 S.Ct. 1173, 1181 (1978) *see also, e.g., Mickensv. Taylor,* 535 U.S. 162, 122 S.Ct. 1237,1241 (2002). As the Supreme Court has repeatedly noted:

> [FN45]. *Accord, e.g., Wood v. Georgia,* 450 U.S. 261, 271, 101 S.Ct. 1097, 1103 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); *United States v. Perez,* 325 F.3d 115. 125 (2d Cir.2003); *United States v. Blount,* 291 F.3d 201, 210 (2d Cir.2002), *cert. denied,* 123 S.Ct. 938 (2003).

"Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.... [A] conflict may ... prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing

hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Wheatv. United States,* 486 U.S. 153, 160. 108 S.Ct. 1692, 1697 (1988) (quoting *J-Joilowav v. Arkansas,* 435 U.S. at 489-90, 98 S.Ct. at 1181). The right to conflict-free counsel applies equally to appointed and, as here, retained counsel. *E.g., Cuvler v. Sullivan,* 446 U.S. 335, 344. 100 S.Ct. 1708, 1716 (1980).

"'[A] defendant has suffered ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance.'" *United States v Biau,* 159 F.3d at 74 *accord, e.g., United States v. Perez,* 325 F.3d at 125; *United States v. Biount,* 291 F.3d at 210-11; *Lopez v. Scully,* 58 F.3d 38, 41 (2d Cir.1995).

*27 The standard governing an ineffective assistance of counsel claim based on an asserted conflict of interest was articulated by the Supreme Court in *Cuvier v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708 (1980), and differs from the more general ineffective assistance standard enunciated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). *See, e.g., United States v. White,* 174 F.3d 290, 294-95 (2d Cir.1999). Indeed, both prongs of the standard--defective performance and prejudice--are substantially different under *Cuyler v. Sullivan.*

As to the defective performance prong, where, as here, a petitioner "raised no objection at trial" regarding the alleged conflict, *Cuvlerv. Sullivan,* 446 U.S. at 348-49, 100 S.Ct. at 1718, his Sixth Amendment claim cannot prevail unless he demonstrates "that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance," *Burgerv. Kemp,* 483 U.S. 776, 783, 107 S.Ct. 3114,3120(1987) (citations & internal

quotations omitted); *accord, e.g.*, *Mickens v. Taylor*, 122 S.Ct. at ("absent objection, a defendant must demonstrate that 'a conflict of interest actually affected the adequacy ofhis representation" ')(quoting *Cuyler v. Sullivan*, 446 U.S. at 348-49, 100 S.Ct. at 1718). The Supreme Court recently clarified that "the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, 122 S.Ct. at 1244 n. *j accord id.* at 1243 ("we think 'an actual conflict of interest' mean[s] precisely a conflict *that affected counsel's pe.iformnance--as* opposed to a mere theoretical division of loyalties.").

"The burden of proof rest[sJ on [Quinones] to show a conflict ofinterest by a preponderance ofthe evidence." *Triana v. United States*, 205 F.3d 36, 40 (2d Cir.) (2255 proceeding), cert. *denied*, 531U.S. 956, 121 S.Ct. 378 (2000) *accord, e.g.*, *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir.2001) *(en banc)* (petitioner must prove by preponderance of the evidence that actual conflict adversely affected attorney's performance), *afJ'd*, 535 U.S. 162. 122 S.Ct. 1237 (2002) *see also, e.g.*, *C'uvler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."). "[T]he burden ofproof cannot be met by speculative assertions ofbias or prejudice." *Trianav. United States*, 205 F.3d at 41.

As for the prejudice prong, because, among other things, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests," *Strickland v. Washington*, 466 U.S. at 692, 104 S.Ct. at 2067, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not

demonstrate prejudice in order to obtain relief," *Cuyler v. Sullivan*, 446 U.S. at 349-50, 100 S.Ct. at 1719 *accord, e.g., Mickens v. Taylor*, 122 S.Ct. at 1244 ("prejudice will be presumed only **if** the conflict has significantly affected counsel's performance--thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown"); *Burger v. Kemp*, 483 U.S. at 783, 107 S.Ct. at 3120. [FN46]

[FN46]. *See also e.g., Cuyler v. Sullivan*, 446 U.S. at 349-50, 100 S.Ct. at 1719 ("Once the Court concluded that [an attorney] had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel." ') (quoting *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467 (1942)) - *United Slates v. Schwarz*, 283 F.3d at 91 ("While a defendant is generally required to demonstrate prejudice to prevail on a *[Strickland]* claim of ineffective assistance of counsel, this is not so when counsel is burdened by an actual conflict of interest. Prejudice is presumed under such circumstances. Thus, a defendant claiming he was denied his right to conflict free counsel • based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish (1) an actual conflict of interest that (2) adversely affected his counsel's performance.") (citations omitted); *Lopez v. Scully*, 58 F.3d at 43 ("Harmless error analysis is inappropriate in this context. Once a petitioner has shown that an actual conflict ofinterest adversely affected defense counsel's performance, prejudice to the petitioner is presumed and no further showing is necessary for

> reversal.... Because prejudice is presumed, the violation of [petitioner's] Sixth Amendment rights cannot be harmless.").

*28 To date, the Supreme Court only has applied this presumption of prejudice to cases involving attorneys who concurrently represented clients with conflicting interests--so-called "multiple concurrent representation." *Mickens v. Taylor,* 122 S.Ct. at *1245-46* ("Tn resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question."). [FN47]

> FN47. The Supreme Court further explained: "Both *Sullivan* itself, and *Holloway,* stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. Not all attorney conflicts present comparable difficulties." *Id.* at 1245 (citations omitted).

B Morris Was Not Subject to an Actual Conflict of Interest that Adversely Affected His Peiformance

Prior to *Mickens v. Taylor,* 535 U.S. 162, 122 S.Ct. 1237 (2002), courts consistently split the *Sullivan* deficiency prong into two elements: (1) actual conflict, and (2) adverse effect on performance. Under this prior precedent, a defendant was required (1) first to prove an actual conflict, and (2) then to prove that the conflict adversely affected the attorney's performance, *i.e.,* that "a 'lapse in representation" 'resulted from the conflict. *See, e.g., United States v. Schwarz,* 283 F.3d 76. 9 1-92 (2d Cir.2002). Although *Mickens* effectively conflated the two elements, *Mickens* i *Taylor,* 122 S.Ct. at 1244 n.5 ("An 'actual conflict,' for Sixth Amendment

purposes, is a conflict of interest that adversely affects counsel's performance."), this Court will analyze the two elements separately for conceptual clarity. *See* Williams v. United States, No. 02-2198, 2003 WL 21182101 at *2.3 (2d Cir. May 20, 2003) *(Post-Mickens* decision: "To prevail on an 'actual conflict' claim, a defendant must first show that an actual conflict existed, then demonstrate that this conflict adversely affected defense counsel's performance." Applying *Strickland* standard because defendant failed to prove that a conflict of interest existed.).

1. *Morris DidNot Have an Actual Conflict of Interest*

A Morris 'Representation of Quinones Was Successive To, Rather than Concurrent with, his Representation of Dennis

A threshold issue is whether Morris' representation of Quinones was successive to or concurrent with his representation of Dennis, as a conflict will be more easily found where the representation was concurrent. *See, e.g.,* Freund v. Buiterworth, 165 F.3d 839, 859 (11th Cir.) *(en banc)* (" '[G]enerally, it is more difficult to prove that successive representation caused an actual conflict ofinterest than that simultaneous representation did so." '), *cert. denied,* 528 U.S. 817, 120 S.Ct. 57 (1999) *see also, e.g.,* Moss v. United States, 323 F.3d 445, 459 (6th Cir.2003); *Perillo v.* Johnson, 205 F.3d 775, 797 (5th Cir.2000) ("Several of our sister circuits have d wn such a distinction in Sixth Amendment conflict of interest cases, holding that an actual conflict may be more difficult to prove when it arises from the context of successive or serial representation rather than concurrent representation.") (citing cases); Salani v. Lockhart, 874 F.2d 525, 527 (8th Cir.), *cert. denied,* 493 U.S. 893, 110 S.Ct. 252 (1989); Mannhaltv .847 F.2d 576, 580 (9th Cir.) ("Generally, it is more difficult to show an actual conflict resulting from successive rather than simultaneous

representation."), *cert. denied,* 488 U.S. 908. 109 S.Ct. 260 (1988).

*29 The state court's C.P.L. § 440 decision implicitly held that Morris' representation of Quinones was successive to Morris' representation of Dennis, as follows: "Moreover, with respect to the defendant's ineffective assistance of counsel claim, the evidence submitted by the People shows that after defendant's brother absconded and was returned to court, he was represented by Victor Dailey Rivera Esq. and not Alvin Morrison [sicj Esq " (Dkt. No.17:9/19/02 State Court § 440 Decision at 2.) The state court's rationale is misguided. It proves nothing that Morris did not still represent Dennis when Dennis returned to court in September 1996, given that Morris had *died* earlier. (See pages 22-23 above.) Rather, the question is whether Morris continued to represent Dennis at the time of Quinones' June 1995 trial and July 1995 sentencing. Nevertheless, while the state court's rationale may have been erroneous, this Court finds that the holding of successive representation is supportable on alternative grounds. [FN48]

> [FN48]. *Cf, e.g., Eze v. Senkowski,* 321 F.3d 110. 125 (2d Cir.2003) (" 'when a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an 'unreasonable application' of clearly established Supreme Court precedent" *')* (quoting *Sellan v. Kuhlrnan,* 261 F.3d 303, 311-12 (2d Cir.200 1)).

"[O]nce established, a lawyer-client relationship does not terminate easily. Something inconsistent with the continuation of the relationship must transpire in order to end the relationship." *SWS Fin. Fund A v. Salomon Bros. Inc.,* 790 F.Supp. 1392. 1398 (N.D.lll.1992). [FN49] In this case,

Morris filed a notice of appearance on behalf of Dennis in February 1993, and Dennis disappeared one month later, reappearing in September 1996. *(See* page 22 above.) In the interim, Morris appeared on behalf of Quinones in January 1994 and defended him at trial and sentencing in June and July 1995. *(See* page 22 above.)

> [FN49]. Courts have held that: the attorney-client relationship is terminated only by the occurrence of one of a small set of circumstances. First, ... the relationship can be terminated by the express statement ofeither the attorney or the client. Second, acts inconsistent with the continuation of the relationship (e.g., the client's filing a grievance with the local bar association against the attorney) are a second means.... Third[,j even without overt statements or acts by either party, the relationship may lapse over time. *SWS Fin. Fund A v. Salornon Bros. Inc.*, 790 F.Supp. at 1398-99.

Although Morris' representation of Dennis was brief, it is difficult to discern a clear termination to the relationship, as Morris never withdrew his notice of appearance and Dennis was still alive at the time of Quinones' trial. Courts generally hold that mere passage of time (here, from February 1993 to June 1995) does not end the attorney-client relationship. [FN5O] *See, e.g., Pen/b v. Johnson,* 205 F.3d 775, 798-99 (5th Cir.2000) ("Where the prior representation has not unambiguously been terminated, or is followed closely by the subsequent representation, there is more likely to be a conflict arising from defense counsel's representation of the first client.... Where, however, defense counsel's involvement in the prior representation was either transient or insubstantial, we have been less inclined to find an actual conflict."); *United States v. Levi',* 25 F.3d 146, 156 (2d Cir.1994) (questioning whether counsel's representation of co-defendant actually terminated when co-defendant fled to

Israel, given that counsel "never formally withdrew as [co-defendant's] representative"); *cf* Caban v. United Stales, 281 F.3d 778, 784 n. 4 (8th Cir.2002) (although attorney claimed his work for other client was not an "active case," this did not preclude finding of concurrent representation and conflict). However, the passage of time, combined with Dennis' disappearance (and the lack of any evidence of later contacts between Dennis and Morris) and, as far as the record shows, Morris' "transient or insubstantial" role in Dennis' criminal case, may provide firmer evidence that the relationship effectively was terminated before Quinones' trial.

> [FN5O]. In the different context of police questioning of a criminal defendant, New York courts have held that" '[o]nce a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer," even where the prior representation took place years earlier. *People v. Singer,* 44 N.Y.2d 241, 251, 405 N.Y.S.2d 17, 23 (1978). Thus, in *People v. West,* 81 N.Y.2d 370, 599 N.Y.S.2d 484 (1993), the Court of Appeals suppressed statements made to the police by a suspect who had been repre ented at a lineup over three years earlier, holding that the police had improperly failed to determine whether the attorney client relationship had terminated, and could not simply assume termination based on the passage of time. *Id.* at 372, 379-81, 599 N.Y.S.2d at 48, 490-91.

*30 In any event, the Supreme Court has repeatedly held that " '[b]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *'Mickens v. Tmlor,* 535 U.S. 162. 122 S.Ct. 1237. 1246 (2002) (quoting *Njxv. Whiteside,* 475 U.S. 157, 165, 106 S.Ct. 988, 993 (1986)) *accord, e.g., United States v.*

Taylor, 139 F.3d 924, 930 (D.C.Cir.1998) ("An ethical lapse is not the same as a conflict of interest...."); *United States v. Gallegos*, 39 F.3d 276, 278 (10th Cir.1994) ("our inquiry is *not* whether a state disciplinary rule for lawyers has been violated ..., but whether, everything considered, Appellant's counsel 'actively' represented conflicting interests").

Moreover, the *Mickens* Court distinguished successive from concurrent representation on the ground that, in a concurrent situation " 'counsel *actively represented* conflicting interests." *'Mickens v. Taylor*, 122 S.Ct. at 1245. Whether or not the relationship between Morris and Dennis technically terminated, the situation here resembles a successive representation more than a concurrent one. The evidence shows that Morris represented Dennis very briefly, apparently only at Dennis' arraignment. Dennis promptly disappeared, never to contact Morris again (as far as the record reveals), and Morris represented Quinones at trial over two years later. All things considered, this Court cannot conclude that Morris continued to "actively represent" Dennis at the time of Quinones' trial.

The Supreme Court has never decided the precise contours of successive or concurrent representation or whether a situation like this should be deemed a concurrent representation. *(See* pages 55-56 above, and pages 78-79 below.) Accordingly, applying AEDPA's deferential standard, this Court cannot say that the state court's conclusion that Morris' representation of Quinones was successive constituted an objectively unreasonable application of Supreme Court precedent.

B Quinones Cannot Prove that Morris was Actually Conflicted, As there is no Evidence that Dennis Shared Relevant Confidences With Morris or That the Two Cases Were Substantially Related

"A conflict may be rooted in the attorney's prior representation of a person whose interests are antagonistic to those of his present client." *United States Blount,* 291 F.3d 201,211 (2d Cir.2002), *cert. denied,* 123 S.Ct. 938 (2003) *see also, e.g., United States v. Malpiedi,* 62 F.3d 465, 467-70 (2d Cir. 1995); *UnitedStatesv. DiTommaso,* 817 F.2d201, 219-20 (2d Cir.1987); *United States v. Gonzalez,* 105 F.Supp.2d 220. 223-24 (S.D.N.Y.2000) *see Church v. Sullivan,* 942 F.2d 1501, 1510-11 (10th Cir.1991) ("in the context of successive representations, we find it difficult to envision circumstances more fraught with inherent conflict than where an appointed attorney representing a reluctant defendant must present a defense theory inculpating the attorney's former client, particularly where the former representation was factually intertwined with the criminal defendant's case"). [FN51] However, "[ut is more difficult for a defendant to show that counsel actively represented conflicting interests in cases of successive rather than simultaneous representation." *Moss v. United Stales,* 323 F.3d at 459 (collecting cases); *accord, e.g., Enoch v. Gramiei,* 70 F .3d 1490. 1496 (7th Cir.1995), *cert. denied,* 519 U.S. 829,117 S.Ct. 95(1996).

> [FN51]. "The fear in successive representation cases is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information.... Thus, the most common example of an actual conflict of interest arising from successive representation occurs where an attorney's former client serves as a government witness against the attorneys current client at trial." *Moss v. United States,* 323 F.3d 445, 460 (6th Cir.2003). One court explained the problems of successive representation in the government witness context as follows:
> Three major potential areas of conflict arise:
> the attorneys pecuniary interest in furthering his business relationship with the government witness may impair the attorney's ability to cross-examine the

> witness zealously; the attorney 'may misuse confidential information obtained frOm the [witness], or may fail to fully cross-examine for fear of misusing confidential information'; or the attorney may be required to testif3r about material aspects of the witness' testimony or otherwise place his own credibility at issue either in cross-examining the witness or in attacking the witness' testimony in summation. *Anwar v. United States.* 648 F.Supp. 820. 826-27 (N.D.N.Y.1986) (citations omitted), *aff'd,* 823 F.2d 544 (2d Cir.1987). The attorney is burdened by both the duties of confidentiality and loyalty to his former client. *United States v. Gonzalez,* 105 F.Supp.2d at 223- 24.

*31 The appropriate standard for finding an actual conflict in the context of successive representation has been described as follows:
An "actual conflict" of interest occurs when a lawyer has "inconsistent interests." In order to prove that an "actual conflict" hindered petitioner's lawyer's performance, petitioner "must make a factual showing of inconsistent interests" or point to "specific instances in the record" to suggest an actual impainnent of his or her interests. "[G]enerally, it is more difficult to prove that successive representation caused an actual conflict of interest than that simultaneous representation did so." At minimum, petitioner must "show that *either* (1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of [petitioner], **01(2)** counsel actually learned particular confidential information during the prior representation of the witness that was relevant to [petitioner's] later case." Even proof of *both* substantial relatedness and confidential information, however, may not necessarily be enough to demonstrate "inconsistent interests" in a successive representation case. The situation may call for "other proof of inconsistent interests." Overall, the "actual

conflict" inquiry is fact-specific, consistent with the petitioner's ultimate burden "to prove that his conviction was unconstitutional." *Freundv. Butterworth*, 165 F.3d 839, 859 (11th Cir.) *(en bane)* (citations omitted), *cert. denied,* 528 U.s. 817, 120 5.Ct. 57(1999) *accord, e.g., Mossv. United States,* 323 F.3d at 462; *Enoch v. Gramlev.* 70 F.3d at 1496; *Mannhaltv. Reed,* 847 F.2d *576,* 580 (9th Cir.) ("In successive representation, conflicts ofinterests may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties."), *cert. denied,* 488 U.s. 908, 109 S.Ct. 260 (1988).

Accordingly, this Court must first determine whether an "actual conflict of interest" existed by looking to whether (1) the two cases were substantially related *or* (2) relevant confidences were shared. If either element is satisfied, then the attorney *may* have labored under "inconsistent interests." *See, e.g., Smith v. White,* 815 F.2d 1401. 1405-06 (11th Cir.) (to determine whether the attorney labored under "inconsistent interests," look to whether cases were substantially related and whether confidences were shared), *cert. denied,* 484 U.S. 863, 108 S.Ct. [81 (1987). The Court must then determine whether these inconsistent interests caused an adverse effect on representation.

Quinones has argued that at the time of trial, Morris must have known that Dennis was the "true killer," because Morris knew that: (1) the .380 caliber handgun for which Dermis was arrested in 1993 was the same type of weapon used in the Carter murder; (2) the prosecution's case relied solely on the eyewitness testimony of individuals who did not know Quinones; (3) in the words of the judge at the *Wade* hearing, Quinones and Dennis "look very much alilce"; (4) Dennis was arrested in the nearby Bronx (the murder took place in upper Manhattan); (5) three months after the Carter shooting Dennis was arrested on the gun charge and then disappeared;

and (6) in 1980 Dennis had been convicted of attempted murder. *(See* page 23 above.)

*32 These allegations prove neither that Dennis shared relevant confidences with Morris nor that Dennis' and Quiniones' cases were substantially related.

Quinones argues that during the short period in which Morris represented Dennis on the gun charge, Dennis *could* have confided in Morris that he killed Carter. Quinones' assertion is, however, purely speculative, and thus cannot ground his conflict of interest claim. *See, e.g.,* Freundv. Butteni'orth, 165 F.3d at 864 (it cannot be presumed that confidences were shared absent evidence of a substantial relationship between the two actions); *Enoch v. Gramley,* 70 F.3d at 1498-99 (hearing unnecessary in 2254 habeas proceeding, where petitioner offered only speculative assertions that allegedly conflicted attorney obtained relevant confidences from conflicting client). Moreover, it seems unlikely that Dennis would have shared with Morris confidences relating to Carter's murder, given that Morris only represented Dennis for a very short time, and apparently only as to an arraignment. [FN52] *See* Perillo v. Johnson, 205 F.3d 775, 799 (5th Cir.2000) ("Where ... defense counsel's involvement in the prior representation was either transient or insubstantial, [the Fifth Circuit has] been less inclined to find an actual conflict."); Salain v. Lockhart, 874 F.2d 525, 528 (8th j) (in determining whether prior representation of another suspect in petitioner's case constituted an actual conflict, court considered "minimal" nature of prior representation, as suspect was only "represented for one day atabondhearing"), *cert. denied,* 493 U.S. 898,110 S.Ct. 252 (1989); *Etna Prods. Co.* V. *Tactica Int'l, Inc.,* 234 F.Supp.2d 442, 444 (S.D.N.Y.2002) ("The nature of the prior representation--brief, episodic, and limited--does not suggest a strong likelihood that relevant confidential information passed from defendants to" counsel). [FN53]

[FN52]. Quinones has offered virtually no evidence regarding Morris' relationship with Dennis. Morris filed a notice of appearance five days after Dennis was arrested. (Dkt. No. 13: Quinones C.P.L. § 440 Reply Br. at 9.) "Shortly thereafter, Dennis Quinones made bail, absconded, and was returned on a bench warrant six years later...." *(Id.)*

[FN53]. In other successive representation cases, the Court was actually able to determine that no confidences had been shared in the prior case--a detennination impossible in this case because Morris is unavailable. *See United States v. Kliti,* 156 F.3d 150, 154-55 (2d Cir.1998) ("Although there may be situations where an attorney's representation of [a co-defendant and adverse witness] at a bond hearing or other preliminary hearing might create a potential or actual conflict of interest, this record does not present that situation," as attorney expressly advised co-defendant at bond hearing that attorney represented other defendant, "and that [co-defendant] should not provide [attorney] with any substantive information because of the possible conflict of interest that could result."); *Mannhalt v. Reed,* 847 F.2d at 580 (No conflict from defense counsel's prior representation of a government witness during a lineup and arraignment, as attorney did not "enter[ ] into an attorney-client relationship with [the witness]. They did not discuss the case with [the witness] or open a file and no further action was taken on [witness'] behalf after the lineup.").

Nor can Quinones show that Dennis' and Quinones' cases were "substantially related." "A nearly endless variety of approaches for detennining whether a substantial relationship exists has surfaced over the years...." *ABA/BNA Lawyers' Manual on Professional Conduct* at 51:224 (2002); *see*

generally id. at 51:221-31;1 Geoffrey C. Hazard, Jr. & W. Willimn Hodes, *The Law of Lawyering,* § 13.5 (3d ed.2002). The Second Circuit follows a stringent standard, requiring that the issues in the former representation be "identical" to or "essentially the same" as those in the current representation. *Government of India v. Cook Indus., Inc.,* 569 F.2d 737, 739-40 (2d Cir.1978) (granting disqualification in civil actions "only upon a showing that the relationship between issues in the prior and present cases is 'patently clear." '). [FN54]

[FN54]. *Accord, e.g., Etna Prods. Co. v. Taclica Int'l, Inc.,* 234 F.Suyp.2d at 444 (civil disqualification case: "'if the facts giving rise to an issue which is material in both the former and the present litigations are as a practical matter the same, then there is a 'substantial relationship' between the representations" '); *Loomis v. Consolidated Stores Corp..* 98 Civ. 8735, 2000 WL 1229262 at *3 (S.D.N.Y. Aug. 29, 2000) *Regal Mktg. Inc. v. Sonny & Son Produce Corp.,* 01 Civ.1911, 2002 WL 1788026 at *7 (S.D.N.Y. Aug. 1, 2002) ("A substantial relationship will be established between the two representations if facts pertinent to the problems for which the original legal services were sought are relevant to the subsequent litigation.") (civil disqualification case); *Mitchell v. Metropolitan Life his. Co.,* 01 Civ. 2112. 2002 WL 441194 at *4..5 (S.D.N.Y. Mar. 21, 2002) (Pauley, **D.J.).** The substantial relationship rule provides that "once the former client [petitioner] proves that the subject matters of the present and prior representations are substantially related, the court will irrebutably presume that relevant confidential information was disclosed during the former period of representation.... The reason for this presumption is that it is not practical or fair to require a subsequent client to prove what specific facts the former client ...

> disclosed to the lawyer during the prior representation. Moreover, standards of professionalism often prevent the lawyer from disclosing such information without the former client's consent. To avoid these complications, upon a showing of substantial relatedness, we presume that the former client divulged to the lawyer ... all of his or her confidences relevant to the subject of the representation." *Freund v. Butterworth*, 165 F.3d at 859-60 (citations, flu., & internal quotations omitted); *accord, e.g.*, *Government of India v. Cook Indus., hic.*, 569 F.2d at 740 ("[W]e start with the well established principle that, in order to grant a disqualification motion, a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case. Such a requirement would put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether."); *Theatre Corp. v. Warner Bros. Pictures, hw.*, 113 F.Supp. 265, 268-69 (S.D.N.Y.1953) (Weinfeld, D.J.).

The keystone in Quinones' argument that the two cases were substantially related is that (1) Dennis' gun was the gun that was used to kill Carter, (2) the case against Quinones was based solely on eyewitness testimony, and (3) Quinones and Dennis resembled each other. Quinones' argument fails on the third point: the only support for the alleged physical resemblance between Dennis and Quinones consists of: (1) Quinones' post-trial assertion *(see* Dkt. No. 20: State Am. Appendix: Quinones C.P.L. § 440 Br. at 5-6, 11; *see also* Dkt. No. 20: State Am. Answer ¶ 29) that one of the pictures in a photo array shown to eyewitnesses depicted his brother Dennis; and (2) the trial judge's remark, after reviewing the

same photo array at the *Wade* hearing, that Quinones and his "brother" resembled each other (H.54). [FN55] In his most recent submission to this Court, however, Quinones claimed that the photo array depicted not Dennis, but rather *"David Quinones," another* "one of Petitioner's brothers." (Dkt. No. 22: Quinones Traverse Br. at 12.) [FN56] Further, the State has now submitted an affidavit averring, based on Dennis' arrest records, that the individual identified in the photo array as Quinones' brother was not, in fact, Dennis. (Dkt. No. 25: A.D.A. Axelrod 5/28/03 Aff. ¶f 3-5.) As a result, the record now contains no admissible evidence that Dennis resembled Quinones.

> [FN55]. At the *Wade* hearing, Detective Milian simply identified the picture as that of Quinones' "brother" "Jorge Vasquez." (Milian: H. 23-24.)
>
> FN56. Quinones made this concession while seeking to rebut the State's argument that Morris may have decided not to point the finger at Dennis, because the eyewitnesses had already proven able to distinguish between Quinones and Dennis in the photo array identification. Quinones responded: "With regard to the photo array which contained a photo of one of Petitioner's brothers. Respondent claims that it was a photo of 'Medina.' [i.e., Dennis]. (Answer at ¶ 27). Actually, the photo array contained the photo of Petitioner's brother, David Quinones. So trial counsel could have, in fact, displayed a photo of 'Medina' to the jury." (Quinones Traverse Br. at 12.)

*33 Absent evidence of a close resemblance between Dennis and Quinones, Dennis was not a plausible suspect in the murder case, and thus Morris did not labor under a conflict of interest, as Morris was not torn between defending Quinones and shifting the blame towards Dennis. *See Cuvier v.*

Sullivan, 446 U.S. at 350, 100 S.Ct. at 1719 ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."); *Triana v. United States*, 205 F.3d 36, 42 (2d Cir.) (rejecting as "speculation" defendant's claim that his attorney was conflicted by third-party's payment of attorney's fees; defendant failed to prove predicate that attorney actively represented conflicting claims), *cert. denied*, 531 U.S. 956, 121 S.Ct. 378 (2000); *Freund v. Butterworth*, 165 F.3d at 864 (where petitioner claimed conflict because attorney failed to shift blame to client formerly represented by attorney, court rejected argument that two crimes were "substantially related," because, *inter alia*, "no evidence exists in the record that the gun [used by petitioner in murder] was the same one that [former client] used in the aggravated assault case"). [FN57] In any event, even if the identity of the gun would cause the cases to be considered substantially related, the Court concludes in the next section that Morris' prior representation of Dennis did not adversely affect his representation of Quinones.

> [FN57]. In *Smith v. White*, 815 F.2d at 1406, petitioner, who was convicted of murder, claimed that his attorney was conflicted because he previously represented another possible murder suspect. Specifically, petitioner confessed that he obtained the rifle tised in the murder when he and a "friend" burglarized a house together. *Id.* at 1404. At trial, the "friend," who was not a suspect inthe murder, testified for the government against petitioner. *Id.* Petitioner claimed that his friend actually committed the murder, and that his attorney failed to accuse petitioner's friend of the crime because counsel previously represented the friend in an unrelated marijuana charge. *Id.* at 1405. The Eleventh Circuit rejected the conflict claim because petitioner came

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forward with no evidence that the murder and marijuana charges were related or that petitioner's counsel had obtained relevant confidences from the friend. *Id.* at 1406. As in this case, petitioner "presented evidence which raised, at very most, a speculative possibility of conflict." *Id.; accord Enoch v. Gramley,* 70 F.3d 1490, 1498-99 (7th Cir. 1995) (petitioner claimed conflict because his attorney previously represented government witness whom petitioner claimed was the "only other suspect in the crime"; court rejected conflict because the prior representation was four years earlier in a completely unrelated case, and petitioner failed to prove relevant confidences were shared), *cert. denied,* 519 U.S. 829, 117 S.Ct. 95 (1996).

2Morris' Prior Representation Of Dennis Did Not Adversely Affect His Representation of Quinones

The Adverse Effect Standard

As noted above, Quinones must show by a preponderance of the evidence that " 'a conflict of interest actually affected the adequacy of his representation." ' *Mickens v. Taylor,* 535 U.S. 162. 122 S.Ct. 1237, 1242-43 (2002) (petitioner must establish that the conflict *"affected counsel's performance--as* opposed to a mere theoretical division of loyalties"); *see also Cuvier v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 1719 (1980) ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."). The Supreme Court has explained, in general terms, that the conflict must have an "adverse" and "significant[1" effect, *Mickens v. Taylor.* 122 S.Ct. at 1244 n. 5, 1245, but has not described the precise contours of the "lapse in representation," *Cuvier v. Sullivan,* 446 U.S. at 349, 100 S.Ct. at 1719 *see, e.g., Burger v. Kemp,* 483 U.S.

776, 785, 107 S.Ct. 3114, 3121 (1987)(rejectingclaim of actual conflict of interest because, *inter alia,* any conflict "did not hanri [the allegedly conflicted] lawyer's advocacy").

To fill this gap, the Second Circuit adopted a test followed by both the First and Third Circuits:
[I]n order to prove adverse effect on the basis of what an attorney failed to do,

*34 "[a defendant first] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Winkier v. Keane,* 7 F.3d 304, 309 (2d Cir.1993) (quoting *United States v. Gainbino,* 864 F.2d 1064, 1070 (3d Cir.l988) (quoting *United States v. Fahey,* 769 F.2d 829, 836 (1st Cir.1985)), *cert. denied,* 492 U.S. 906, 109 S.Ct. 3215 (1989)), *cert. denied,* 511 U.S. 1022, 114 S.Ct. *1407(1994);accord, e.g. United States v. Schwarz,* 283 F.3 d 76,92 (2d Cir.2002); *Amiel v. United States,* 209 F.3d 195, 199 (2d Cir.2000); *Triana v. United States,* 205 F.3d 36. 40-41 (2d Cir.), *cert. denied,* 531 U.S. 956, 121 S.Ct. 378 (2000). Based on this two-element test, the Second Circuit has held that once a petitioner demonstrates an actual conflict, he: is not required to show that the lapse in representation affected the outcome of the trial or that, but for the conflict, counsel's conduct of the trial would have been different. *[United States v.l Malpiedi,* 62 F.3d [465,1 469 [(2d Cir.1995)]. The forgone strategy or tactic is not even subject to a requirement of reasonableness. *Id.* As we have previously recognized, [t]he test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. An attorney who is prevented from pursuing a

strategy or tactic because of the canons of ethics is hardly an objective judge of whether that strategy or tactic is sound trial practice. United States v. Schwarz, 283 F.3d at 92. [FN58]

> [FN58]. *Accord, e.g.,* Hess v. Mazurkiewicz, 135 F.3d 905, 910 (3d Cir.1998) (Petitioner "must identif,' a plausible defense strategy that could have been pursued, and show that this alternative strategy inherently conflicted with, or was rejected due to, [counsel'sj other loyalties or interests.... Significantly, [petitioner] need not show that the lapse in representation was so egregious as to violate objective standards for attorney performance. See *[United* States v. Gainbino, 864 F.2d 1064, 1070 (3d Cir.l988)] (noting that accused may establish a lapse in representation merely by showing counsel rejected a defense that 'possessed sufficient substance to be a viable alternative').').

Other circuits have held, to the contrary, that in order to prove an adverse effect, petitioner must show that the foregone strategy was "objectively reasonable." *See* Mickens v. Taylor. 240 F .3d 348. 361 (4th Cir.2001) *(en banc), affd,* 535 U.S. 162, 122 S.Ct. 1237 (2002); *Freund v. Butterworth,* 165 F.3d 839, 860 (11th Cir.) *(en banc), cert. denied,* 528 U.S. 817. 120 S.Ct. 57 (1999). As the *en banc* Eleventh Circuit held:

First, [petitioner] must point to "some plausible alternative defense strategy or tactic [that] might have been pursued." Second, *he must demonstrate that the alternative strategy or tactic was reasonable under the facts.* Because prejudice is presumed, the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used," rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." Finally, he must show some link between the actual conflict and the decision to forgo the alternative

strategy of defense. In other words, 'he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

*35 Freundv. Butterworth, 165 F.3d at 860 (quoting Freundv. Butterii'orth, 117 F.3d 1543, 1579-80 (11th Cir.1997)) (emphasis added & citations omitted). [FN59]

[FN59]. The Fourth Circuit, *en bane,* offered a similar formulation:

First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, *the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts* of the case known to the attorney at the time of the attorney's tactical decision.... [T]he petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." ... Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict. Mickens v. Taylor, 240 F.3d at 361 (emphasis added). A panel of the Eight Circuit followed a similar path, albeit not as well-defined. *See* Caban v. United States, 281 F.3d 778, 786 (8th Cir.2002) ("if a reasonable attorney would have adopted the same trial strategy absent a conflict, [petitioner] cannot show [his attorney's] performance was *adversely* affected by that conflict" under *Cuyler v. Sullivan* standard).Certain circuit court decisions seem to apply the *Strickland* standard of deferring to counsel's "trial strategy" rather than applying *Sullivan* "adverse effect" standard. *See* United States v. Mavs, 77 F.3d 906, 908- Q (6th Cir. 1996) ("[D]efendant must show not only a conflict but also that the conflict caused the attorney to make bad choices for his client. In fact, the incidents referred to in defendant's brief of

> arguably unwise questions by defense counsel of prosecution witnesses appear to have been part of a losing strategy but they were not the result of choices made where there were clearly better alternatives. *Siricklandv. Washinion,* 466 U.S. 668, 689, 104 S.Ct. 2052,2065, 80 L.Ed.2d 674 (1984) ('Judicial scrutiny of counsel's performance must be highly deferential)."); *United States v. Kindle,* 925 F.2d 272, 275-76 (8th Cir.1991) ("[T]he defendant must 'demonstrate an actual conflict of interest which adversely affected his attorney's performance' to obtain relief.... The limited record is simply inadequate for us to conclude that there was an actual conflict of interest arid clear prejudice to appellant. The alleged omissions by defense counsel are not enough in the context of the record to constitute clear evidence of a conflict of interest and prejudice. Such decisions could have been defense strategy, and we give great deference to counsel's determinations within that realm."). Deference to "trial strategy" in the context of a conflict of interest review seems plainly contrary to Supreme Court precedent, as it would eviscerate the less deferential standard announced by the Supreme Court in *Cuyler v. Sullivan* and its progeny. The standard announced in *Sullivan* was meant to be different from *Strickland.* Deferring to trial strategy would render the first prong of *Sullivan* no different from *Strickland* (although *Sullivan's* presumption of prejudice would still remain in the second prong).

Thus, there is no Supreme Court precedent, but a split in circuit authority, regarding the appropriate conflict of interest standard. Under AEDPA, however, the question is whether the state court's decision unreasonably applied *Supreme Court* precedent; "[a] petitioner cannot win habeas relief solely by demonstrating that the state court unreasonably

applied Second Circuit precedent." *Yung v. Walker*, 296 F.3d 129, 135 (2d Cir.2002). Given that the Supreme Court has not spoken on whether or not the plausible alternative strategy need be "reasonable," and the circuits are divided, this Court cannot say that the Second Circuit's holding that a petitioner need not prove that a foregone strategy was "reasonable" represents "clearly established" Supreme Court precedent under AEDPA. *See James v. Herbert*, No. 02-2389,57 Fed. Appx. 894, 896, 2003 WL 328803 at *2 (2d Cir. Feb. 13, 2003) (where Supreme Court had not spoken on a particular counsel conflict issue, and at least one other circuit court disagreed with the Second Circuit's position on the issue, the Second Circuit could not say that the state court's contrary decision " 'unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to [a] situation[ ] which that principle should have, in reason, governed" '); *Hines v. Miller*, 318 F.3d 157, 164 (2d Cir .) ("Given the many divergent approaches and outcomes in federal courts that have applied clearly established Supreme Court precedent to the facts at issue and the absence of any Supreme Court decision concerning this type of [ineffective assistance] claim, we find no basis for concluding--as the dissent does--that the Appellate Division's decision here constituted an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States."), *cert. denied*, No. 02-9637,2003 WL 1609428 (May 19.2003); *Del Valley. Armstrong*, 306 F.3d 1197, 1200 (2d Cir.2002). This Court therefore concludes that, in the absence of Supreme Court precedent on point, the First Department's decision can be upheld under the Eleventh Circuit standard--i.e., Quinones had the burden of proving by a preponderance of evidence that Morris did not pursue some "reasonable" strategy because of his alleged conflict. [FN6O]

FN6O. While the state court's C.P.L. § 440 decision failed to explain which conflict of interest standard it employed, this Court must nevertheless determine the

appropriate conflict of interest standard against which the state court's decision should be judged. *See Eze v. Senkowski*, 321 F.3d 110, 125 (2d Cir.2003) (" 'when a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an 'unreasonable application' of clearly established Supreme Court precedent" ')(quoting *Seilan v. Kuhlinan*, 261 F.3d 303. 3 11-12 (2d Cir.2001)).

B There was no Adverse Effect on Morris' Representation Of Quinones, Because (a) Dennis was Not a Plausible Suspect, and (b) Pointing the Finger at Dennis Would Only Have Inculpated Quinones

Quinones alleges that but for a conflict of interest, Morris would have: (1) requested that ballistics tests be performed on Dennis' gun; (2) accused Dennis at trial of committing the murder; and (3) called certain alibi witnesses to testif,,'. These were not reasonable strategies.

*36 First, Morris' failure to call other witnesses, including Akili, cannot reasonably be ascribed to any conflict of interest. [FN61] Akili's affidavit merely exculpates Quinones; it does not in any way inculpate Dennis. (Dkt. No. 20: State Am. Appendix: Quinones C.P.L. § 440 Motion Ex. G: Akili Aff.) Quinones' assertion that Alcili might have identified Dennis at trial as the kifier lacks support in Akili's affidavit, which appears to have been prepared at Quinones' (or his current investigator's) request. *(See id.)* As for witnesses other than Akili, since Quinones fails to describe the nature of their testimony, the Court cannot conclude that they would have inculpated Dennis. Since calling Akili and the other witnesses would not have inculpated Dennis, Morris' failure to call them does not demonstrate a conflict of

interest or a plausible alternative defense strategy that was foregone because of a conflict. At best, the alleged failure to offer these other witnesses merely demonstrates Morris' incompetence, an issue analyzed in Point V below. *See,* e.g., *Moseley v. Scully,* 908 F.Supp. 1120, 1142 (E.D.N.Y.1995) ("Even assuming, *arguendo,* thatthese [foregone] motions were plausible and likely to succeed, there is simply no evidence that they were 'inherently in conflict with or not undertaken due to [attorney's purported] other loyalties or interests." '), *affd,* 104 F.3d356 (2dCir.1996).

> [FN61]. At most, Morris' conflict of interest would have caused him to (1) fail to ask for a ballistics test, and (2) fail to ask eyewitnesses at trial to compare Dennis' picture.

Second, as explained in Point TV.B.1.b above, absent evidence of a close physical resemblance between Dennis and Quinones, Morris would have had no reason to believe that Dennis was a reasonable suspect in the Carter murder. Indeed, although it is now undisputed that Dennis possessed the murder weapon, there is no evidence that *Morris* lcnew, or had reason to know, this "at the time of [his] tactical decision," *Mickens v. Taylor,* 240 F.3d 348, 361 (4th Cir.2001) *(en banc), aff7d,* 535 U.S. 162, 122 S.Ct. 1237 (2002). Because Morris had no plausible reason to suspect Dennis of the murder, accusing Dennis of the murder (or even requesting a ballistics test) was not a "reasonable," plausible defense strategy that an unconflicted attorney would have taken, and thus any "conflict" here had no adverse effect on Quinones' case. *See United Slates v. Blount,* 291 F.3d 201. 211-12 (2d Cir.2002) (no conflict found where a member of defendant's attorney's law firm had represented the government's witness in an unrelated matter, but, *inter alia,* defendant failed to show that the prior representation "had any effect" on defense counsel's performance), *cert. denied,* 123 S.Ct. 938 (2003); *Freund v.*

Butterworth, 165 F.3d 839. 866-68 (11th Cir.) *(en banc)* ("wholesale shifting ofthe blame to [allegedly conflicted attorney's former client] was not a plausible defensive 'option *realistically* available to trial counsel[,]" ' even though all of the state's physical proof "either belonged to or was found on property of' the former client, who was a separately-tried, non-testifying co-defendant), *cert. denied*, 528 U.S. 817, 120 S.Ct. 57 (1999); *Oliver v. Wainwrght*, 782 F.2d 1521. *1525-26* (11th Cir.1986) (petitioner failed to prove actual conflict of interest based on attorney's failure to shift blame to jointly-represented co-defendant, as the facts did not support the blame-shiffing theory; although the co-defendant "either held the deceased by her arm, or instigated the fight between [petitioner] and the deceased, or both ... [t]hese facts alone do not support the theory that [co-defendant] stabbed the deceased"), *cert. denied*, 479 U.S. 914, 107 S.Ct. 313 (1986) *Bisaccia v. United States*, No. 97 CV 6683, 97 CV 3659, 2000 WL 703014 at *10 n. 6 (E.D.N.Y. Apr. 12, 2000) (rejecting as "speculation about possibilities untethered to facts" defendant's claim that counsel's conflict kept him from" 'put[ting] on truthful evidence that [counsel's prior client] had a key role in the murder ... and that [defendant] was not at all involved" *');* *United States v. Felzenberg*, 97 Civ. 2800, 93 CR. 460, 1998 WL 152569 at *16 (S.D.N.Y. Apr. 2, 1998) (Sotomayor, D.J.) (rejecting as "baseless" defendant's "claim that, because of a conflict of interest, [defendant's attorney] rejected a defense that would point to [attorney's other client] as the real villain behind the fraud scheme," as this alternative defense strategy "lacked credibility"). [FN62]

[FN62]. *Compare, e.g., Sanders v. Ratelle*, 21 F.3d 1446, 1453-55 (9th Cir.1994) (Petitioner's attorneys at both his first trial (ending in a hung jury) and second trial were found to be conflicted by loyalty to petitioner's brother, who had been previously represented by the (first-trial) attorney on the very

same charges. Unlilce here, however, petitioner and his brother were both "prime suspect[s]," and petitioner's counsel advised the brother to invoke the Fifth Amendment rather than testify even though he was *"the* key witness" and would have exculpated petitioner.).

*37 Third, requesting a ballistics test proving that Dennis possessed the murder weapon had the serious risk of *inculpating,* not exculpating, Quinones. Importantly, because no evidence linked Quinones with a murder weapon, Morris was able argue to the jury that the state's case consisted *solely* of two "eyewitnesses," one of whom did not see the shooting and the other of whom could not identify Quinones at trial. *(See* pages 14-15 above.) Had a ballistics test shown that Dennis' gun was the murder weapon, and had Morris then accused Dennis of the murder, the prosecution would have argued to the jury (as it has argued here) that Quinones undoubtedly gave the gun to his brother Dennis during the three months between the murder and Dennis' arrest. The prosecution could then point to both eyewitness testimony *and* a connection between Quinones and the murder weapon, via his brother Dennis. Testing Dennis' gun could have supplied a missing link in the prosecution's case--a linic between Quinones and the murder weapon. That would hardly have been a "reasonable" trial strategy. *See* Triana v.. United States, 205 F.3d 36, 41 (2d Cir.) (attorney's advice that defendant not testify did not "support inference of divided loyalty," as such testimony would have beenrisky), *cert. denied,* 531 U.S. 956. 121 S.Ct. .378 (2000); *United States v. Felzenber* 1998 WL 152569 at * 16 (rejecting defendant's claim that counsel failed to pursue a "viable alternative defense strategy," as the proffered strategy would have undermined the reasonable strategy actually pursued).

Moreover, in the absence of a resemblance between Dennis and Quinones, the jury would have had little reason to thinic

that the eyewitnesses identified the wrong brother. Accusing Dennis would only have linked Quinones to the murder weapon while undermining the defense theory that Quinones was framed by other drug dealers. [FN63] *See Lombardo v. United States*, 222 F.Supp.2d 1367, 1386-87 (S.D.Fla.2002) (attorney's failure to call his prior client as a witness did not prove divided loyalty, as it would have undermined defendant's only available defense theory); *cf Hess v. Mazurkiewicz*, 135 F.3d 905, 910- 11 (3d Cir. 1998) (finding actual conflict where attorney failed to call witnesses who might have exculpated petitioner *and* inculpated attorney's former client).

> [FN63]. This case thus resembles cases in which a defendant complained that his allegedly conflicted attorney failed to point the blame at defendant's co-conspirators, even though such blame would have inculpated defendant as well. *See, e.g., United States v. Stanlini*, 85 F.3d 9, 18- 19 (2d Cir.), *cert. denied*, *519U.S.* 1000, 117 S.Ct. 498 (1996).

Finally, the key issue in any conflict of interest claim is whether a reasonable attorney unburdened by the conflict might have acted differently at trial. Here, Quinones' conflict claim is dependent on his supposition that Dennis confessed to his attorney Morris at the time of his arraignment on weapons possession charges that he had shot Carter. Yet a reasonable, unconflicted attorney would not have been privy to that confession. Having no evidence that Dennis was the killer, an unconflicted attorney would have had no reason to point the finger at Dennis. This Court must therefore conclude that even if Dennis told Morris that he was the murderer, that confidence did not have an adverse effect on Morris' representation of Quinones, as Morris acted no differently than an unconflicted attorney would have acted. *See United States v. Shwayder*, 320 F.3d 889, 890 (9th Cir.2003) ("There was one fact not available from an

independent source--that [prior client] had lied to [attorney] during his prior representation. It is impossible, however, to characterize [attorney's] failure to mention this fact as an adverse effect caused by his former representation of [prior client]. [Attorney's] communications with [prior client] were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either. [Attorney] did, nevertheless, emphasize in closing that [prior client] had lied to everyone else, specifically mentioning 'his [other] lawyer,' as well as [defendant--attorney's current client].''), *amending* fl F.3d 1109, 1119-20(9th Cir.2002). Since Quinones has asserted (to avoid laches) that he did not know of Dennis' arrest for possessing a .380 gun, an unconflicted attorney similarly would not have known that fact, and would have no basis, or reason, to try to point the finger at Dennis. Thus, Morris' prior representation of Dennis would not have caused him to act any differently than a non-conflicted attorney.

*38 Ultimately, this Court cannot say that the state court's § 440 decision was an objectively unreasonable application of Supreme Court precedent, in that Quinones has failed to prove that Morris labored under a conflict of interest, much less that such conflict caused Morris to forego some objectively reasonable alternative defense trial strategy.

C.It is Not Reasonably Probable that any Conflict Prejudiced Quinones' Case

It is well-settled Supreme Court precedent that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan,* 446U.S. 335, *349-50,* 100 S.Ct. 1708, 1719 (1980) *accord, e.g., Mickens v. Taylor,* 535 U.S. 162, 122 S.Ct. 1237, 1244 (2002) ("prejudice will be presumed only if the conflict has significantly affected counsel's performance--thereby rendering the verdict unreliable, even though

Stricklandprejudice cannot be shown"). In its most recent decision on the issue of conflicts, however, the Court emphasized that it had never applied this presumption of prejudice outside the context of "multiple concurrent representation." *Mickens v. Taylor,* 122 S.Ct. at 1245. Indeed, the Court cautioned that its decision should not be "misconstrued" as extending the *Sullivan* rule to conflicts involving successive representation:

In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question. *Id.* at 1245-46. The Supreme Court seemed to distinguish successive representation cases on the ground that the *Sullivan* presumption of prejudice only applied where " 'a defendant shows that his counsel *actively represented* conflicting interests." *'Id.* at 1245 (quoting *Cuvier v. Sullivan,* 446 U .S. at 350. 100 S.Ct. at 1719) (emphasis added in *Mickens*). The Sixth Circuit recently stated that "[i]n the wake of *Mickens,* no court has applied the *Sullivan* presumption to a case of successive representation." *Moss v. United States,* 323 F.3d 445, 460 (6th Cir.2003) (collecting cases).

In light of *Mickens,* "[t]here is ... no 'clearly established federal law, as detennined by the Supreme Court of the United States' mandating reversal of a conviction on a mere showing of a conflict of interest involving successive representation that adversely affected the attorney's representation of his client." *Montova v. Lylle,* No. 01-23 18. 53 Fed. Appx. 496,498.2002 WL 31579759 at *2 (10th Cir. Nov.20, 2002), *cert. denied,* No. 02-9835. 2003 WL 1825142 (May 19. 2003). [FN64] Accordingly, on habeas review, conflict claims involving successive, rather than concurrent, representation, must satisfy the *Strickland* standard for proving prejudice, *i.e.,* petitioner must show " 'a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 'Mickens v. Taylor, 122 S.Ct. at 1240 (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052. 2068 (1984)). See Montoya i Lytie, 2002 WL 31579759 at *2 (on habeas review, applying *Strickland* prejudice standard to conflict claim involving successive representation).

> [FN64]. See also Smith v. Hofbauer, 312 F.3d 809, 8 16-18 (6th Cir.2002) (State court held that prejudice would not be presumed where attorney was being prosecuted in the same county as the criminal defendant he represented. On habeas review, in light of *Mickens,* Sixth Circuit held that "the Supreme Court has never applied Sullivan's lessened standard of proof to any conflict other than joint representation," and that the state court decision was thus not an objectively unreasonable interpretation of "clearly established" Supreme Court precedent.). *But see* United States v. Young. 315 F.3d 911, 914-15 n. 5 (8th Cir.) *(Sullivan* applies to cases of "multiple or serial" representation, while *Stricklandapplies* to all other conflicts), *cert. denied,* No.02-9949,2003 WL 1923315 (May 19, 2003).

*39 Applying *Strickland,* the Court agrees with the **C.P.L.** § 440 court's decision that there is no reasonable probability that any conflict of interest prejudiced the outcome of Quinones' case. [FN65] Prejudice is a close question here because a "reasonable probability" of •prejudice is a relatively low standard *(see* page 37 n. 28 above). Given that the jury's deadlock required *two Allen* charges *(see* page 18 above), even a small amount of exculpatory evidence could have tipped the balance in favor of acquittal. The Court nevertheless concludes that no prejudice was likely, for the same reasons the Court found no likelthood of an adverse effect on Morris' representation. *(See* pages 73-77 above .)

Simply put, because there is no admissible evidence that Dennis resembled Quinones, there would be little reason to think that accusing Dennis of the crime would help Quinones' case, where two eyewitnesses identified Quinones as the shooter. Quite the contrary, as explained above, accusing Dennis--and thus connecting Quinones to the murder weapon--would almost certaiiily have damaged Quinones' case.

> [FN65]. The state court held that: the possibility that the handgun which the defendant's brother was later arrested for illegally possessing, and which defendant contends is the real murder weapon--and his brother the real murderer--is of no consequence since a witness identified the defendant as the shooter, as the person seen speaking with the decedent moments before the murder, and as the person with whom one of the identifying witnesses had a verbal exchange at the crime scene before the murder.
> (Dkt. No. 17: 9/19/02 State Court § 440 Decision at 2.) Again, the Court agrees with the state court's holding of no prejudice but not its rationale.

While this Court might hold differently if presented with the question *de novo,* the Court cannot say that the state court's result was an objectively unreasonable application of Supreme Court precedent.

For all these reasons, Quinones' conflict of interest ineffective assistance claim should be denied.

V. *QUINONES' TRIAL ERROR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS SHOULD BE DENIED*

Quinones alleges a host of trial attomey errors, divided into seven categories based on the subheadings in Quinones' First

Department brief on direct appeal: (1) failing to offer a coherent theory of the case (Dlct. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at *39-45);* (2) failing to object to the admission of multiple items of evidence--especially hearsay and Deans' pretrial identification *(ii* at 45-46); (3) asserting various ineffective arguments *(id.* at 46-47); (4) making no attempt to obtain possibly favorable evidence from Deans' daughter *(id.* at 48); *(5)* failing to object to several improper statements and arguments in the prosecutor's summation *(id.* at *48-51);* (6) failing to object to improper jury instructions, particularly where testimony was mischaracterized *(Id.* at 51-52); and (7) trial counsel's aggregated errors constitute ineffective assistance of counsel in violation of the Sixth Amendment even if the individual errors did not *(id.* at *53-58).*

The Court begins with a short section on the proper procedure for analyzing ineffectiveness claims where the allegedly ineffective counsel is dead. There follows an analysis of each of Quinones' claims under *Strickland's* first prong--deficient performance. Specifically, taking each claim, *seriatim,* the Court analyzes whether Quinones has shown that Morris erred, and concludes with an analysis of whether any aggregated errors amount to deficient performance under *Strickland.*

A. *Analysis ofIneffective Assistance of Counsel Claims Where Counsel is Unavailable*

*40 Were Morris alive today, this Court could convene a hearing at which Morris could testify regarding his trial strategy and the motives behind his actions at trial (for example, his failure to object to seemingly inadmissible testimony). Since Morris is unavailable to testify, however, a hearing is unnecessary. *See, e.g., Hen,-yv. Scully,* 918 F.Supp. 693, 715 (S.D.N.Y.1995) ("Normally, before finding counsel inadequate, an evidentiary hearing would be held, at

which questions of strategy would be addressed. In this case, petitioner's trial counsel is deceased, and that is not possible." On the trial record, habeas court finds aggregate errors rendered counsel ineffective where there were no rational strategic grounds for counsel's actions.), *affd,* 78 F.3d 51 (2d Cir.1996). [FN66]

> [FN66]. *See also, e.g., Fink v. Lockhart,* 823 F.2d 204, 206 (8th Cir.1987) ("Because [petitioner'sJ trial counsel died before any of the post-conviction proceedings, we never will know whether his omissions were a part of a deliberate trial strategy." Court nevertheless affirms finding that attorney not ineffective.); *cf United States v. King,* No. 00-7773, 11 Fed. Appx. 219,220-21, 2001 WL 568022 at *2 (4th Cir. May 23, 2001) (remanding for factual findings on whether counsel advised petitioner "of the disposition of his criminal appeal in this court and of the opportunity to seek a writ of certiorari from the Supreme Court"; noting that although trial counsel could not testify, as he was dead, the government had not yet attempted to obtain the attorney's case file). Although Quinones obtained a copy of Morris' case file (Dkt. No. 13: Quinones C.P.L. § 440 Reply Br. Ex. A), the State has failed to offer any relevant evidence from the file.

Since Morris' death precludes determination of his reasons for his actions (or inactions), this Court has no choice but to decide the issue based on the available evidence. *See, e.g., United Stales v. Childress,* 58 F.3d 693, 736 (D.C.Cir.l995) ("We recognize that the district court's inquiry will be complicated immeasurably by [requested trial counsel's] death. We ask only that the district court examine the available evidence" to determine whether defendant was denied the right to counsel of choice.), *cert. denied,* 516 U.S. 1098, 116 S.Ct. 825(1996); *Buliockv. Whitlev,* 53 F.3d 697.

701 (5th Cir.1995) (Because trial counsel "is now deceased ... [his] reasons for failing to investigate [petitioner's] mental state more thoroughly are now forever indeterminable. However, trial counsel's testimony is not necessary to our determination that a particular decision might be considered sound trial strategy."); *Flores v. Keane,* 211 F.Supp.2d 426, 446 (S.D.N.Y.200 1) (rejecting petitioner's argument that court could not decide issue without affidavit from trial counsel; "among other reasons, trial counsel, *Alvin Morris,* is deceased, and the Court must 'examine the available evidence," 'quoting *Childress).*

Morris' death, of course, does not relieve Quinones of the burden of overcoming the presumption that Morris' representation was competent. *See, e.g., Slevin v. Unites Stales,* 71 F.Supp.2d 348, 358 n. 9 (S.D.N.Y.1999) ("[B]ecause the death of a petitioner's trial counsel is just as, if not more, likely to prejudice the respondent, it does not relieve the petitioner of his 'heavy burden' of proving ineffective assistance."), *affd,* 234 F.3d 1263 (2d Cir.2000).

B. *Stricklands' First Prong: Deficient Peiforinance*

1. *Quinones' Claim that Morris' Theoiy of the Defense was "Incoherent"*

Quinones asserts that Morris failed to have a "coherent theory of the defense." (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 39-45.)

The Second Circuit has consistently stated that the court will not"'second-guess matters of trial strategy simply because the chosen strategy has failed." *'Lake v. Portuondo,* No. 00-2 150, 14 Fed. Appx. 126. 128,2001 WL 830583 at *1 (2d Cir. July25, 2001), *cert. denied,* 535 U.S. 999, 122 S.Ct. 1565 (2002) *accord, e.g., Smithy. Keane,* No.95-2480, 101 F.3d 1392, 1996 WL 364539 at *3 (2d Cir. July 2, 1996), *cert.*

dehied, 519 U.S. 969, 117 S.Ct. 396 (1996); *United States v. DiTommaso,* 817 F.2d 201, 215 (2d Cir.1987). Rather, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and must presume that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washinglon,* 466 U.S. 668, 689-90, 104 S.Ct. 2052, 2065-66 (1984) *see United States v. Luciano.* 158 F.3d 655. 660 (2d Cir.1998) ("[A]n appellate court on a cold record should not second-guess [counsel's trial conduct] decisions unless there is no strategic or tactical justification for the course taken."), *cert. denied,* 526 U.S. 1164, 119 S.Ct. 2059 (1999).

*41 This Court has carefully read the entire trial transcript in this case. Contrary to Quinones' assertion, the Court finds that Morris pursued a competent (albeit ultimately unsuccessful) trial strategy of blaming Carter's death on competitors in the drug trade who then framed Quinones. *(See, e.g.,* pages 9, 11-12, 15 above.) *Cf. United States v. Thristino,* No. 01-1155, 47 Fed. Appx. 7, 9, 2002 WL 31008776 at * 1 (2d Cir. Sept. 9, 2002) ("it was reasonable for counsel to agree to admission of [drug-related] evidence in order to advance the theory that [defendant's] apartment mates, who were government witnesses and admitted drug users, were seeking to frame" defendant). Indeed, Quinones concedes that the strategy of showing that Carter was a drug dealer killed by other drug dealers was "reasonable," but that "the execution ofthe strategy was incompetent," since it "was never supported by evidence." (Dkt. No. 1: Pet. Ex. B: Quinones 1st Dep't Reply Br. at 7.)

While Morris' presentation was far from elegant, and sometimes bordered on the inarticulate, the Court cannot say that his shortcomings were of a constitutional magnitude. *See e.g., United States v. Hon,* 17 F.3d 21, 26-27 (2d Cir.1994) (counsel not ineffective, where counsel's "closing argument

began with the following garbled statement: 'The awesome majesty that has become the American bald eagle, yet, you must render unto Caesar only what justly belongs to Caesar, and it was the intention **of** our founding father that you use this rendition and temper it with reasonable doubt." ' Counsel's "comment was merely inarticulate" and his "argument as a whole was an effective one."); *United States v. DiTonnnaso,* 817F.2d at 216 ("We have reviewed at length transcripts of trial counsel's cross-examination and summation. To put it charitably, neither performance furnishes a full model for aspiring advocates. On the other hand, we have not discovered any error of constitutional dimension.") (fn omitted).

Quinones complains that Morris' opening statement promised to present witnesses proving that Carter had been killed by his partner in the drug business and that Quinones had been framed. (Quinones 1st Dep't Br. at 39-41.) That is inaccurate, as Morris never promised to present defense witnesses, as opposed to "showing" certain things. (Defense Opening: Tr. *395-96.)* The decision as to whether to make an opening statement, and its scope, is a matter of trial strategy. *See, e.g., Un ited States v. Kortright,* No. 99-1225,205 F.3d 1326 (table), 2000 WL 232291 at *1 (2d Cir. Jan. *25,* 2000) (rejecting ineffective counsel claim based on, *inter alia,* "the content of counsel's opening statement," "because displeasure with defense counsel's trial strategy is not sufficient to establish ineffectiveness under the stringent requirements of *Strickland,* ... and because [petitioner] has not shown that trial counsel's assistance was unreasonable under all the circumstances"); *United Statesv. Nersesian,* 824F.2d 1294, 1321 (2dCir.1987) ("[T]he decision whether to make an opening statement and when to make it is ordinarily a matter of trial tactics and strategy which will not constitute the incompetence basis for a claim of ineffective assistance of counsel."), *cert. denied,* 484 U.S. 1061. 108 S.Ct. 1018 (1988); *Cromwellv. Keane,* 98 Civ. 0013. 2002

WL 929536 at *23 (S.D.N.Y. May 8, 2002) (Peck, M.J.) ("Counsel's decision not to make an opening statement may be attributed to counsel's trial tactics.") (citing cases). Moreover, consistent with his opening promise that "we will show you that the person who was killed was a drug dealer" (Tr. 395), Morris elicited evidence through cross-examination of the State's witnesses that Carter, in fact, was a drug dealer. (*See* pages 11-12 above.) Morris did not promise the jury that the defense would call witnesses, and the decision of what witnesses to call, or not call, is a strategic decision. *See, e.g., United States v. Best,* 219 F.3d 192. 201 (2d Cir.2000) ("counsel's decision as to 'whether to call specific witnesses--even ones that might offer exculpatory evidence--is ordinarily not viewed as a lapse in professional representation.' "), *cert. denied,* 532 U.S. 1007, 121 S.Ct. 1733 (2001); *United States v. Smith,* 198 F.3d 377,386 (2d Cir. 1999) ("[C]ounsel's decision not to call witnesses to testify about [a particular question] cannot form the basis of a meritorious ineffective assistance claim. 'The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.' "), *cert. denied,* 531 U.S. 864. 121 S.Ct. 156 (2000); *United States v. Luciano,* 158 F .3d at 660 ("The decision not to call a particular witness is typically a question of trial strategy that appellate courts are ill-suited to second-guess."); *Unites States v. Bruce,* No. 97-1198, 97-1372, 159 F.3d 1348 (table), 1998 WL 538146 at *4 (2d Cir. Mar. 13, 1998) (decision not to call any witnesses did not support ineffective counsel claim, where evidence was obtained through cross-examination of government witnesses); *United States v. Nersesian,* 824 F.2d at 1321 ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.").

*42 Quinones also argues that Morris' inept cross-examination of Detectives Sheridan and Kaplan merely resulted in damaging testimony regarding Quinones' efforts to flee when being arrested. (Quinones 1st Dept Br. at 42.) On direct, however, the detectives already had described Quinones' attempt to flee. (Sheridan: Tr. 601-02; Kaplan: Tr. 620-21.) One can hardly blame Morris for attempting to shake the detectives' story, even if that attempt backfired. *See, e.g., Bilzerian v. United States*, No. 96-2920, 125 F.3d 843 (table), 1997 WL 603470 at *2 (2d Cir. Sept. 30, 1997) ("Defense counsel's decisions were part of a reasonable trial strategy, that simply did not work. [On cross-examination, c]ounsel understandably tried to rebut damaging testimony, only to find their decision led to more harmful evidence. This decision does not fall below a level ofreasonableness."), *cert. denied*, 21 U.S. 1021, 119 SCt. *2365* (1999 *see also Dunham v. Travis*, 313 F.3d 724, 732 (2d Cir.2002) ('Decisions about 'whether to engage in crossexamination, and if so to what extent and in what manner, are ... strategic in nature' and generally will not support an ineffective assistance claim."); *UnitedStates v. Luciano*, 158 F.3d at 660 ("[T]he conduct of examination and cross-examination is entrusted to the judgment of the lawyer, and an appellate court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken.");. *United States* V. *Nersesian*, 824 F.2d at 1321 ("Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature.").

Quinones also complains that Morris failed to assert certain lines of argument in his summation. For example, one problem with Morris' "frame-up" theory was that, if Deans intended to frame Quinones by falsely identifying him at the lineup, she likely would have identified him at trial as well. (Quinones 1st Dept Br. at 44.) In Quinones' view, Morris should have explained that Deans may have been unwilling

to commit perjury, as her trial testimony was under oath but her lineup identification was not. *(Id.)* According to Quinones, Morris also failed to argue in summation that Scarlett's and Deans' testimony that they did not know each other was not credible, as they admitted that one was the girlfriend and the other the long-time friend of the same man, and Deans' daughter somehow knew where to find Scarlett to tell her that Carter had been shot. (Quinones 1st Dep't Br. at 44-45.) Further, Quinones claims that Morris failed to argue that Quinones fled from the officers because they were in plain clothes and thus were not recognizable as police officers. (Quinones 1st Dep't Br. at 45, 47.)

Morris' decision to forego all of these arguments, however, falls under the rubric of trial strategy. As the Supreme Court explained: "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. at 689. 104 S.Ct. at 2065. The Court cannot say that Morris' failure to assert the alternative arguments proffered by Quinones render Morris' performance ineffective. [FN67]

> [FN67]. Quinones also points out certain lines of cross-examination by Morris that did not bear fruit, and, indeed, seem entirely irrelevant. (Quinones 1st Dep't Br. at 41-44.) Since, however, this testimony did not affirmatively damage Quinones' case, and Morris otherwise made a relatively effective presentation, such irrelevant material cannot ground an ineffective counsel claim. Quinones also notes certain factual inaccuracies asserted by Morris, such as his claim that Deans had testified that Quinones was *not* the shooter (Defense Summation: Tr. 653-54), when in fact she had merely testified that she did not know whether the shooter was in the courtroom (Deans: Tr. 429). (Quinones 1st Dep't Br. at 43.)

Morris' version of events, however, benefitted the defense.

*43 This Court is, however, somewhat troubled by Morris' confusing summation regarding Deans' identification testimony. *(See* Quinones 1St Dept Br. at 43-44.) As noted above, Deans testified at trial that she was unable to identify the shooter in court, and seemed to explain her inability by stating that at the time of the murder she only saw a "profile" of the shooter. (Deans: Tr. 429 ("Q. You don't know? A. No. I just had sort of a profile.").) Morris could have argued to the jury not only that Deans could not identify Quinones as the shooter at trial, but that Deans' "profile" testimony also threw her lineup identification into doubt. By emphasizing the poor angle of her view of the shooting, Deans implied that she never got a good look at the shooter. If the *angle* of her view of the shooting--as opposedto the lapse oftime--made it impossible for her to recognize the shooter in court, then her lineup identification may have had no basis.

Although Morris' summation emphasized Deans' inability to identify Quinones as the shooter in court (Defense Summation: Tr. 653-54), he seemed to state that Deans had testified that she had only seen a profile of Quinones in the *lineup:*

Now, the District Attorney showed [Deans] a photograph which is in evidence which is People 'is' *9, a lineup photo.* And what does she say to that? Do you recall her saying this? And I could be wrong. It's your recollection that counts, not mine.

You are the judges of the facts. And if there's any dispute, just ask this gentleman here to read it back to you, her testimony, Carol Deans. (Indicating)

• *She said she only looked at the profile. Remember that word. The profile of the person in this lineup seated in the third position. The profile.*

A profile is not a face. It's part of a face, isn't it? Or, has it

changed since overnight? Since overnight has it changed? I don't ththk so.
That's what that lady said.
Has there been any identification of my client being the shooter in this case? By anyone? No. Absolutely not.(Defense Summation: Tr. *655,* emphasis added.) [FN68]

> [FN68]. In a colloquy with the court at the conclusion of the State's case, in support of defense's motion to dismiss, Morris repeated the same misconstrual of Deans' testimony:
> "Your Honor, a careful perusal of the testimony of the lady who allegedly participated in the lineup testified that she identified a profile of a person seated in Seat Number 3. She said she did not identify the defendant as he sits in court as being in that particular seat." (Tr. 637.) By contrast, the State's summation stated that Deans testified that she only saw a profile at the time of the shooting: And she got a good look at him. If you'll remember, yeah, [Deans] said she got a side profile view; but just after the shooting when he didn't know which way to go, he looked at her direction, and she remembered that. (State Surmriation: Tr. 684.) Notably, the trial court itself found Deans' "profile" testimony unclear: "[Deans] said she didn't know because she only saw a profile. She didn't say when she saw a proffle." (Tr. 808.)

Morris' apparent interpretation of Deans' testimony makes no sense. To explain her inability to identify Quinones in court, Deans stated that she just had sort of a profile." (Deans: Tr. 429.) Why would she have referenced the poor viewing conditions at the lineup (without actually mentioning the lineup) in response to a question of whether the person sitting in front of her in court was the same person she saw commit a shooting? Indeed, the subject ofthe lineup was not

even *mentioned* until later in Deans' testimony. (Deans: Tr. 429, 431.)

Although this Court has not been provided with a clear copy of the lineup photograph, this Court may take judicial notice of the fact that lineups do not generally consist solely of profile views. The testimony reveals that the individuals were "seated throughout the entire lineup." (IVlilian: H. 21, 56; Deans: Tr. 431; Milian: Tr. 533.) Had this been a profile-only lineup, presumably one of the witnesses to the lineup would have mentioned that fact. The jury also would immediately have seen that Morris' alternate interpretation made no sense, as the jury had access to the lineup photograph admitted into evidence that (presumably) showed a full-face view of each individual.

*44 Although Deans' "profile" testimony was ambiguous, the most reasonable interpretation--and the one most helpful to the defense--was that she only had a profile of the shooter at the time of the shooting. By asserting that Deans only viewed Quinones' profile at the lineup, Morris missed a vital opportunity to question Deans' identification testimony. Because Morris' actions seems to have been based on a misinterpretation of testimony, this Court cannot simply excuse his actions as "trial strategy." [FN69]

> [FN69]. *See, e.g.,* Kimmel, 'nan v. Morrison, 477 U.S. 365. 385, 106 S.Ct. 2574, 2588 (1986) (decision based on ignorance of relevant facts and "mistaken beliefs" as to legal procedures was not based on "strategic considerations"); *Lindstadt v. Keane,* 239 F.3d 191, 201 (2d Cir.2001) ("The prosecution emphasizes that defense counsel was not alone in failing to notice these errors, a point also made by the state appellate court and the district court. We do not think that the failure of others to notice establishes that the point is so subtle that an effective counsel

> would miss it. A trial judge has a full plate without undertaking an independent study of the facts on which the parties seem to agree. The prosecutor may (though should not) have other priorities."); *Paveiv. Hollins,* 261 F.3d 210. 218 &n. 11 (2d Cir.200 1) (decisions made in ignorance of relevant facts or law cannot be characterized as strategic under *Strickland,* collecting cases); *Fov. Kernan,* No. C95-3581, 1998 WL 470470 at *8 (N.D.Cal. Aug. 7, 1998) ("[Wjhile trial counsel's ... letter to [the petitioner] is not by itself probative, it certainly implies that trial counsel did not have a grasp on the details of the plea agreement.... This letter therefore strongly suggests that trial counsel's advice about the plea agreement was steeped more in uninfonned confusion than in cunning strategy.").

While Morris could have more effectively used Deans' testimony, ultimately Morris did get his point across. He reminded the jury that Deans could not make an in-court identification (Defense Sununation: Tr. 653-54), posited that the lineup had been contaminated (referencing the "profile" testimony), and concluded that Quinones had not been identified by "anyone" as the shooter (Defense Summation: Tr. 655). [FN70] Morris' summation on this point could have been much better, but it was not objectively unreasonable.

> [FN7O]. Further, Morris repeatedly advised the jury to have the trial testimony read back to them *(e.g.* Defense Summation: Tr. 655), and one of the first actions the jury took after beginning deliberations was to ask to have Deans' testimony read back (Tr. 759-60), thus presumably curing any distortion caused by Morris' summation.

Quinones' claim that Morris' theory of the defense was "incoherent" is really a collection of specific challenges to

Morris' conduct. Morris' defense theory was clear and coherent--Quinones was not the shooter, no one identified him as the shooter, and Carter was a drug dealer who was killed by fellow drug dealers. The overall defense theory was coherent, albeit unsuccessful. The Court cannot say that the First Department's denial of this ground of Quinones' ineffective assistance claim was an "unreasonable application" of the *Strickland* standard.

2. *Morris' Alleged Failure to Object to Admission of Evidence*

Quinones asserts that Morris failed to object to the admission of multiple items of evidence. (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 31-38, 45-46.) On direct appeal, the First Department rejected all of Quinones' evidentiary claims as unpreserved: '[c] ach of defendant's contentions concerning the court's evidentiary rulings requires preservation (CPL 470.05 IZU and we decline to review any ofthese unpreserved claims in the interest of justice." *People v. Quinones*, 272 A.D.2d 228.229,708 N.Y.S.2d 616,616(1st Dep't 2000). The First Department also held that Morris' "alleged deficiencies did not deprive [Quinones] of a fair trial." *Id.* at 229, 708 N.Y.S.2d at 616.

a. *Morris' Failure to Object to Lineup Testimony Without Foundation*

Quinones claims that Morris erroneously failed to object to the admission at trial of testimony regarding Deans' pretrial identification, where no foundation had been laid under C.P.L. 60.25 that Deans could not identify the defendant at trial because of the passage of time or the defendant's changed appearance. (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dept Br. at 31- 34, 45.) [FN71]

[FN71]. Quinones could prevail if he proved that counsel's performance was objectively unreasonable in failing to assert a meritorious objection under either New York State law or federal constitutional law. *See Sellan v. Kuhlman,* 261 F.3d 303,309-10 (2d Cir.200 1) (petitioner may claim ineffective assistance of appellate counsel based on counsel's failure to raise state law claim on appeal); *Mayo v. Henderson,* 13 F.3d 528, 533-36 (2d Cir.1994) ("The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim...."); *Ciaudio v. Scully,* 982 F.2d 798, 803-05 & n. 5 (2d Cir.1992) ("The federal constitutional right to effective assistance of counsel may be violated by an attorney's failure to raise a meritorious state law claim or defense."), *cert. denied,* 508 U.S. 912. 113 S.Ct. 2347 (1993); *Larreav. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *19n 34 (S.D.N.Y. May 31, 2002) (Peck, M.J .) (Petitioner "could prevail if he proved that counsel's performance was objectively unreasonable in failing to preserve a meritorious federal *or* state claim."), *report & rec. adopted.* 2002 WL 18082i1 (S.D.N.Y. Aug. 6, 2000) (Scheindlin, D.J.); *Fluellen v. Walker,* 97 Civ. 3189, 2000 WL 684275 at *12 (S.D.N.Y. May 25, 2000) (Peck, M.J.) (trial counsel was not ineffective for failing to object to Allen charge, because charge was correct under both federal and state law), *aj[fd,* No. 01-2474, 41 Fed. Appx. 497, 2002 WL 1448474 (2d Cir. June 28. 2002), *cert. denied,* 123 S.Ct. 1787 (2003).

The New York Court of Appeals has described the criteria for admitting testimony regarding a pre-trial identification pursuant to C.P.L. 60.25, as follows:

*45 The authorization contained in CPL 60.25 is specific and limited. By its terms, CPL 60.25 does not allow third-party testimony confirming a pretrial identification by a

nontestifying witness. Instead, the statute expressly delineates preconditions and the particular instances for the admission of previous identification evidence, inthe absence oftrial-present identification. The witness who made the pretrial identification must have testified to: (1) observing the defendant "either at the time and place of the commission of the offense or upon some other occasion relevant to the case;" (2) observing, under constitutionally permissible circumstances, "a person whom he recognized as the same person whom he had observed on the first or incriminating occasion;" and (3) being "unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question".... *People v. Patterson,* 93 N.Y.2d 80, 82. 688 N.Y.S.2d 101, 103 (1999) (quoting C.P.L. 60.25) *accord, e.g.,Peoplev. Quevas,* 81 N.Y.2d41,42-43, 595 N.Y.S.2d 721, 722 (1993).

"Central to the admissibility of third-party testimony under CPL 60.25 is the fact that the witness cannot state, 'on the basis of present recollection,' whether or not defendant is the person in question." *People v. Bavron.* 66 N.Y.2d 77,81,495 N.Y.S.2d24, 26(1985). Although the statute does not define "present recollection," the New York Court of Appeals has long held that the statute "applies to a situation where the witness, due to lapse oftime or change in appearance of the Defendant, cannot make an in-court identification, but has on a previous occasion identified the defendant." *People v. Nival,* 33 N.Y.2d 391, 394-95, 353 N.Y .S.2d409. 411-12, *cert. denied,* 417 U.S. 903, 94 S.Ct. 2597 (1974) *accord, e.g., People v. Bavron,* 66 N.Y.2d at 81, 495 N.Y.S.2d at 26 ("CPL 60.25 has been applied in instances where the eyewitness has been unable to recognize defendant due to lapse of time or change in appearance") (collecting cases). [FN72]

[FN72]. Once the witness testifies that he cannot make an in-court identification, but has on a previous

> occasion identified the defendant ..., the fact that the defendant is the person whom the witness previously identified 'may be established by testimony of another person or persons to whom the witness promptly declared his recognition' at the time he made the prior identification.... The testimony of the witness and the other person, taken together, constitutes 'evidence in chief. *People v. Nival*, 33 N.Y.2d at 394, 353 N.Y.S.2d at 412. Thus, if Deans' testimony satisfied C.P.L. 60.25, it was proper for Detective Milian to testify about Deans' identification of Quinones at the lineup. *See also, e.g., People v. Nival*, 33 N.Y.2d at 393, 396, 353 N.Y.S.2d at 410. 413 (police testimony admissible as to eyewitness' pretrial identification, where defendant subsequently changed his appearance so that eyewitness could not identify him at trial); *People v. Walters*, 299 A.D.2d 377, 378, 749 *N.Y.S.2d* 156. 156 (2dDep't 2002) (Police testimony as to pretrial identification held admissible where the "victim testified at the trial, which was held almost one year after the crime occurred, that '[i}t's been so long' that he could not recognize in the courtroom the person who robbed him. Further, the victim testified that he identified the perpetrator to the police immediately after the crime occurred, and that the person the police arrested was the person who robbed him."), *appeal denied*, 99 N.Y.2d 621, 757 *N.Y.S.2d* 832 (2003).

Deans' trial testimony was not sufficiently specific so as to satisfy the State's burden, as her inability to identify Quinones as the shooter was not ascribed to either lapse of time or a change in Quinones' appearance:

Q. The person that you saw talking to Lamont Carter eventually firing the weapon, do you see him in court today?
A. I don't know.
Q. You don't know?

A. No. I just had sort of a profile.
Q. Are you saying you are unable to identify him today in court?
A. Yeah.
(Deans: Tr. 429.)
Q.... When you came into this court today you
• indicated you couldn't say that this is the person that you saw on the 31st of December, 1992, correct?
A. That is true.
(Deans Tr. 433.) Nor did the trial court make a finding that Deans' inability to identify Quinones resulted from a failure of recall due to lapse of time.

*46 In *People v. Quevas*, 81 N.Y.2d at 43-44, 595 N.Y.S.2d at 722, an eyewitness repeatedly answered "nope" in response to the question of whether his assailant was in the courtroom. The Court of Appeals held:
The proper foundation was not laid for the admission of the police officer's testimony as to the complainant's out-of-court identification of the defendant. Although it was their burden to do so, the People did not establish the reason why the complainant could not make an in-court identification. In order to lay a proper foundation under CPL 60.25 there must be testimony from the witness which establishes a lack of present recollection of the defendant as the perpetrator.... The evidence must establish a lack of present recollection as a basis for the lack of identification and not a fear of identifying the defendant.... Here, the identification testimony from the witness was ambiguous and there was no basis for the court to make a finding in accordance with CPL 60.25 that the witness could not identify the defendant on the basis of present recollection. Moreover, the court did not make a finding that the complainant had no present recollection of the defendant.... It is possible, for example, that the complainant could not identify defendant because (1) he was physically or mentally incapable of doing so; (2) he was too frightened to do so ...; or (3) defendant was not the

perpetrator. *Id.* at 45-46, 595 N.Y.S.2d at 723z *accord, e.g., People v. Marte-Nuesi,* 248 A.D.2d 555, 555-56, 669 N.Y.S.2d 866-67 (2d Dep't) ("[T]rial court erred by permitting a third party to testify as to the complainant's prior identification of the defendant as the perpetrator. The identification testimony from the complainant at trial was ambiguous, and there was no basis for the court to make a finding in accordance with CPL 60.25 that the complainant could not identify the defendant on the basis ofpresent recollection...."), *appeal denied,* 92 N.Y.2d 901. 680 N.Y.S.2d 65 (1998); *People v. Morton,* 189 A.D.2d 488, 495, 596 N.Y.S.2d 783, 788-89 (1st Dept 1993) ("Upon being asked if she saw, in the courtroom, the two men who entered her apartment and robbed her, the complainant stated, 'I don't see them'; 'I really don't see them' and, 'I'm sorry, your Honor, I don't see them'. At no time did she state that defendants were not the perpetrators. Nor is there any indication that she did not identify them for fear of reprisal.... As *Quevas* clearly holds, before a witness's testimony as to the complainant's out-of-court identification of the defendant may be admitted, a proper foundation, i.e., that the witness cannot identify the defendant on the basis of present recollection, must be laid. Our review of the record indicates that, while such a showing might well be made in this case, it was not on this record.'); *People v. Smith,* 195 A.D.2d 265, 267, 599 N.Y.S.2d 582, 584 (1st Dep't 1993) (same; related case). [FN73]

> [FN73]. *See also, e.g., People v. Marrero,* 183 A.D.2d 728, 729, 583 N.Y.S.2d 468, 470 (2d Dep't) (where "the complainant was not 100% certain [at trial that] the defendant was the perpetrator, but he did not attribute his uncertainty to the lapse of time or a change in the defendant's appearance," "it was improper to admit the third-party testimony by the arresting police officer which had the effect of bolstering the testimony that [the complainant] was

100% certain when he made the prior identification"), *appeal denied,* 80 N.Y.2d 906, 588 N.Y.S.2d 831 (1992) *cf People v.. Bavron,* 66 N.Y.2d at 82,495 N.Y.S.2d at 26 (Third party testimony as to eyewitness' pretrial identification inadmissible, where, "[by] his repeated refusals to identify defendants because of fear of retribution, [the eyewitness] manifested not an inability to identify these defendants--a neutral fact--but the converse."); *People v. Murphy,* 235 A.D.2d 933. 934-35, 654 N.Y.S.2d 187, 190 (3d Dep't) ("In order to lay a proper foundation for such testimony, there must be evidence establishing a lack of present recollection of the defendant as the perpetrator.... This foundation was established here by evidence that defendant had significantly changed his appearance between [the time of the crime] and the trial ....), *appeal denied,* 90 N.Y.2d 896, 662 N.Y.S.2d 439 (1997).

*47 Deans did, of course, testify at trial that she witnessed the shooting *(e.g.,* Deans: Tr. 421-22, 435), and also identified a photograph of the pretrial lineup, circling Quinones' picture as the individual she identified at the time ofthe lineup. (Deans: Tr. 43 1-32.) The State argues that Deans' trial testimony "acknowledg[ing]" her pretrial identification is the "plain equivalent of what Section 60.25 requires--a statement that the witness is 'unable' to state whether the defendant is the perpetrator." (Dkt. No. 6: State Appendix Ex. C: State 1st Dep't Br. at 14.) The State, however, offers no authority to support this proposition, which seems contrary to the New York Court of Appeals' *Quevas* decision.

Nevertheless, Morris may have decided for strategic reasons to leave Deans' ambiguous testimony as is, rather than to object and risk more damaging testimony. After all, Deans had no difficulty picking Quinones' face from the lineup

photograph at trial, and acknowledged picking Quinones at the lineup. Had Morris objected on C.P.L. 60.25 grounds to the admission of testimony regarding the lineup, the State almost certainly would have elicited from Deans that her inability to recognize Quinones at trial was due to lapse of time. *(See* Dkt. No. 6: State Appendix Ex. C: State 1st Dep't Br. at 14.) [FN74] Further, had either the State or Morris inquired of Deans further, she might have cleaned up her ambiguous (but seemingly exculpatory) statement that she "just had sort of a profile." (Deans: Tr. 429.) Instead, Morris let Deans' testimony stand, and then emphasized on summation that: (1) Deans failed to identify Quinones at trial as the shooter, and (2) Deans' testimony that she only saw the shooter's "profile" threw her entire lineup identification into question. [FN75] *Cf. e.g., UniledSiales v. Miguel,* No. 97-1047, 122 F.3d 1058 (table), 1997 WL 557589 at *3 (2d Cir. Sept. 9, 1997) (attorney's failure to object to hearsay was a reasonable trial strategy given defendant's theory of the case); *United States Brant,* No. Civ. A. 91-5859 & 91-6673, Crim. 89-111-02 & 89-111-01, 1993 WL 313369 at *5 (E.D.Pa. July 30, 1993) (Attorney "was more reserved and subtle, preferring to leave that last, dangerous question unasked, so that the seed of doubt could be nurtured in summation."), *affid,* 27 F.3d 559 (3d Cir.), *cert. denied,* 513 U.S. 904, 115 S.Ct. 268 (1994).

[FN74]. Had this occurred, however, the State would not have been able to argue on closing that Deans failed to identify Quinones at trial due to fear. *(See* pages 16 above & 126-27 below.)

[FN75]. As noted in Point V.B.1 above, although Morris' summation on this point was less than articulate, he nonetheless conveyed the point that Deans had not identified Quinones and had not even sufficiently viewed the shooter.

Thus, the Court cannot say that Morris' decision not to object on C.P.L. 60.25 grounds was not based on reasonable trial strategy. More importantly, the Court cannot say that the First Department's decision denying Quinones' ineffective assistance claim on this ground was an "unreasonable application" of the *Strickland* standard.

b. *Morris' Failure to Object to Police "Bolstering" Testimony*

Morris failed to object to Detective Milian's testimony that he looked for Quinones in order to place him in a lineup after speaking to Scarlett, Deans, and other detectives. (Milian: Tr. 525-26.) According to Quinones, "[t]he inevitable inference which the jury must have drawn from this testimony was that there was information from unspecified sources identifying the defendant as the man who had committed the shooting." (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 34-36, 45.)

*48 The relevant testimony is as follows:
Q. Upon receiving the assignment regarding the Lamont Carter homicide investigation [on December 31, 1992], what did you do?
A. I responded to the location and I coordinated with detectives and officers that were at the location.
Q. Did you have occasion at some point later that day to speak to anybody?
A. Yes, I did.
Q. Who did you speak to?
A. Police Officer Ramos.
Q. Did you also have occasion--aside from Officer Ramos, did you speak to any other detectives?
A. Yes. Several.
Q. And, did you have occasion to speak to any civilians on that date as pertaining to that case?
A. Yes.
Q. Who was that?

A. I spoke to Marion Scarlett.
Q. Where was it you spoke to her?
A. We spoke to her in the 25 Precinct.
Q. And, did there come a time that you spoke to Carol Deans?
A. Yes, there was.
Q. When was that that you personally spoke to her? A. It was approximately January 3rd of 1993.
Q. Now, with regard to Ms. Scarlett, did you have occasion to speak to her again?
A. Yes, I did.
Q. When was that?
A. I spoke to her March 1st of'93, also.
Q. Now, *after speaking to Ms. Scarlet, to Ms. Deans, and the other detectives, did there come a point in time in March of 1993 that you wanted to see the defendant in this case?*
A. Yes, there was.
Q. For what purpose did you want to see the defendant at that time?
A. I wanted to put him in a corporeal lineup.
Q. What efforts did you make to find the defendant in order to put him in that corporeal lineup?
A. I canvassed the Lincoln Projects area where he was purportedly sighted and spoke to his wife.
Q. When did you speak to her?
A. April 1, 1993.
(Milian: Tr. 524-26, emphasis added.)

New York courts have long held that police witnesses may not "bolster" a witness' identification of a defendant by testifying that hearsay conversations between the police and the witness led to the defendant's arrest, even if, as here, the connection between the conversation and the arrest is only "implicit" or "inferential." *See* People v. Hoit, 67 N.Y.2d 819, 820, 501 N.Y.S.2d 641, 642 (1986) ("It was also error to permit a police officer to testify, over objection, that he had arrested the defendant after conferring with the eyewitness.

Although such implicit bolstering may not have warranted reversal in and of itself..., the testimony should be excluded upon proper objection at the retrial."); *People v. Martinez*, 209 A.D.2d 641, 642, 619 N.Y.S.2d 134, 135 (2d Dept 1994) ("it was error to permit the back-up officer to testify, over objection, that he had identified the defendant after conferring with the undercover detective who had observed the perpetrator, because such testimony constitutes improper bolstering"), *appeal denied*, 85 N.Y.2d 911, 627 N.Y.S.2d 334 (1995); *People v. Bryan*, 179 A.D.2d 667, 668, 578 N.Y.S.2d 608, 609-10 (2d Dep't) ("The arresting officer testified that he charged the defendant with the robbery after the complainant gave certain responses to questions during the lineup. Although the arresting officer did not reveal any answers given by the complainant, this testimony was improperly admitted since it implicitly bolstered the complainant's testimony."), *appeal denied*, 80 N.Y.2d 829, 587 N .Y.S.2d 913 (1992). [FN76]

[FN76]. *People v. Liberatore*, 167 A.D.2d 425, 426, 561 N.Y.S.2d 832, 834 (2d Dep't 1990) ("we agree that the trial court erred in permitting police officers to give bolstering hearsay testimony concerning conversations with witnesses and the fact that these conversations led to the defendant's arrest."), *appeal denied*, 78 N.Y.2d 956, 573 *N.Y.S.2d* 651 (1991); *People v. Montes*, 149 A.D.2d 956, 956, 540 N.Y.S.2d 89, 89 (4th Dep't) ("The court erred by allowing two police officer witnesses to testify that, after speaking with eyewitnesses to a fatal shooting, they issued an order for defendant's arrest. This testimony indirectly bolstered the identification of defendant and was improper."), *appeal denied*, 74 N.Y.2d 744, 545 N.Y.S.2d 118 (1989); *People v. Faison*, 126 A.D.2d 739, 739-40, 511 *N.Y.S.2d* 324, 326 (2d Dep't 1987) ("the testimony by a police officer that the complainant had identified the

defendant to him as her robber, and that, after having a brief conversation with her, he arrested the defendant, improperly bolstered the complainant's identification testimony, both directly ... and inferentially.... Although the defendant did not preserve the issue for appellate review ..., we deem this an appropriate case for exercising our discretion to reach this issue in the interest ofjustice."); *People v. Vasguez.* 120 A.D.2d 757, 757-58, 502 N.Y.S.2d 282, 283 (2d Dep't 1986) ("It was also improper for the arresting officer to testify, over objection, that he arrested the defendant after conferring with the complaining witness and determining that the witness was certain of his identification. This testimony amounted to implicit bolstering and was error.... Where, as here, a conviction is based solely upon identification testimony by a single witness who made a brief observation of his assailant, any error which is apt to enhance the weight of such testimony may not be disregarded as being merely technical in *nature.");Peopiev. Lee,* 1 1OA.D.2d913,915, 488 N.Y.S.2d 738, 741 (2d Dept 1985) ("During his testimony, the investigating detective was permitted to testify, over objection, that the defendant became a suspect the day after the young victim had provided a description of his assailant. Such testimony, which raised the inference that the victim had identified the defendant, was inadmissible hearsay ..., which, in effect, was utilized to bolster the victim's identification testimony." This was error, though not reversible standing alone.); *People v. Cumrnins,* 109 A.D.2d 748,749-50,485 N.Y.S.2d 847,849 (2dDep't 1985) ("testimony of an investigating detective that, after speaking to a codefendant, he obtained a warrant for defendant's arrest," constituted "impermissible hearsay").

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*49 A small number of decisions have allowed such testimony on the ground that it merely supported the "narrative of events" leading up to the arrest. *See* People v. Tlanier, 255 A.D.2d 610, 610, 680 N.Y.S.2d 877, 877-78 (2d Dept 1998) ("The defendant was convicted of robbing the complainant of two chains. A detective testified that after he had a conversation with the complainant, the investigation focused on the defendant. Then, the detective later testified that the defendant was arrested. The defendant now contends that this testimony constitutes impermissible bolstering, requiring reversal. Because the defendant at no time objected to this testimony, his claim is unpreserved for appellate review.... In any event, this testimony 'merely served as a necessary narrative of events leading to [the] defendant's arrest...."), *appeal denied,* 93 N.Y.2d 903, 689 N.Y.S.2d 715 (1999); *People v. Stansberry,* 205 A.D.2d 317, 3 17-18, 613 *N.Y.S.2d* 6,7 (lstDep't) (Rejecting bolstering claim. "During cross-examination of the victim defense counsel elicited testimony that defendant was arrested after the victim spoke to a police officer. The brief and restricted testimony by a police officer that he spoke to the victim, and that defendant was arrested afterward, merely served as a necessary narrative of events leading to defendant's arrest."), *appeal denied,* 84 N.Y.2d 910, 621 N.Y.S.2d 528 (1994); *People v. McClain,* 176 A.D.2d 521, 522, 574 N.Y.S.2d 712, 712 (1st Dep't 1991) (Although "the arresting officer testified that he spoke with the victim before arresting defendant, ... the confrontation clause is not implicated in this case as no statement by the victim was introduced at trial. Rather, the arresting officer's testimony at trial was merely that he arrested defendant after interviewing two eyewitnesses and the victim, and conducting further investigation. Furthermore, the People presented the two eyewitnesses to the shooting, who were long-term acquaintances of defendant and unequivocally identified defendant as one of the shooters, as well as corresponding spent shells recovered from the scene. Thus, even on an 'implied bolstering' theory,

there is no likelihood that the jury might have substituted the officer's brief testimony for that of the eyewitnesses, or that it in any way contributed to the verdict ...."), *appeal denied, 79* N.Y.2d 950. 583 N.Y.S.2d 204 (1992).

While the issue is a close one, the Court cannot find that Morris erred by failing to object. First, Detective Milian testified that he sought out Quinones "after speaking to Ms. Scarlet, to Ms. Deans, *and the other detectives."* (Milian: Tr. 526, emphasis added.) This reference to conversations with other detectives reduced the danger that the jury would connect the eyewitness conversations with the arrest. *See People v. McClain,* 176 A.D.2d at 522. 574 N.Y.S.2d at 712 (police "arrested defendant after interviewing two eyewitnesses and the victim, and conducting further investigation"). [FN77]

[FN77]. Bolstering is generally not a cognizable federal claim. *See, e.g., Bailey v. People of State of New York,* 01 Civ. 1179, 2001 WL 640803 at *8 (S.D.N.Y. June 8, 2001) (Peck, M.J.) (citing cases). Quinones cites (Quinones 1st Dep't Br. at 36) to *Mason v. Scully,* 16 F.3d 38.42 (2d Cir.1994), where the Second Circuit held that "[a] defendant's right to confront the witnesses against him includes the right not to have the incriminating hearsay statement of a nontestifying codefendant admitted in evidence against him," and found counsel ineffective for failing to object to such testimony. Although the testimony in *Mason* is strikingly similar to that found here, *Mason v. Scully,* 16 F.3d at 40, this case is distinguishable for two reasons. First, both Deans and Scarlett ultimately testified at trial, subject to cross-examination. This case thus lacks the Confrontation Clause concerns raised in *Mason,* which involved hearsay from a *non* testifying codefendant. Second, the *Mason* Court expressly relied on the fact that "there was no police

work that turned up [defendant], and the only lead to him obviously came from [the detective's] conversation with [co-defendant]." *Id.* at 44. Here, by contrast, Detective Milian sought out Quinones "after speaking to Ms. Scarlet, to Ms. Deans, *and the other detectives.* "(Milian: Tr. 526 (emphasis added).) *See* Quartararo v. Hanslinaier, 186 F.3d 91, 99 (2d Cir.1999) ("Unlilce *[Mason* } ..., this is not a case in which no police work turned up petitioner and the only lead to him came from [co-defendant's] conversation with [a detective]."), *cert. denied,* 528 U.S. 1170, 120 S.Ct. 1196 (2000).

*50 Second, Morris may have reasonably chosen not to object in order to avoid highlighting the testimony, which the jury likely failed to notice (as it consisted of only a single, fleeting, reference) and which was not later emphasized in the State's summation. [FN78]

FN78. *See, e.g., United States v. Schake,* No. 02-1743, 57 Fed. Appx. 523, 526, 2003 WL 202439 at *2 (3d Cir. Jan. 29, 2003) (Affirming district court's finding "that counsel's failure to object to a single, brief question by the prosecutor ... was reasonable in light of counsel's fear that an objection would highlight the matter for the jury."); United States v. *Alsop,* No. 99-3 983. 12 Fed. Appx. 253, *258,* 2001 WL 391967 at *3 (6th Cir. Apr. 12.2001) ("the prejudicial testimony was not elicited by the Government, was limited to a single reference ..., and passed without objection or request for a curative instruction. A curative instruction would have emphasized and may have undermined defense counsel's strategy to ignore the remark."), *cert. denied,* 534 U .S. 916. 122 S.Ct. 262 (2001); *Anderson v. Sternes,* 243 F.3d 1049, *1057-58* (7th Cir.) (Petitioner's "attorney may have strategically

decided that it was better not to ask for a limiting instruction ... because such an instruction would highlight the evidence to the jury. Such a strategy is reasonable, especially given that the evidence ... was a minor portion of the government's case."), *cert. denied,* 534 U.S. 930, 122 S.Ct. 294 (2001); *Buehi v. Vaughn,* 166 F.3d 163, 176 (3d Cir.) (Agreeing with state court's conclusion that "[b]ecause the [objectionable] statements were fleeting, 'trial counsel may have wished to avoid emphasizing what might have gone relatively unnoticed by the jury." '), *cert. dismissed,* J U.S. 1050. 119 S.Ct. 2418 (1999); *United States v. Grunberger,* 431 F.2d 1062, 1069 (2d Cir.1970) ("it is understandable that a defense counsel may wish to avoid underscoring a prejudicial remark inthe minds of the jury by drawing attention to it" through an objection); *Un lied Slates v. Corcoran, 855* F.Supp. 1359, 1371 (E.D.N.Y.1994) ("reasonable tactical decision" not to object to damaging testimony, as it "would merely serve to highlight the testimony"), *affd,* 100 F .3d 944 (2d Cir.), *cert. denied,* 517 U.S. 1228. 116 S.Ct. 1864 (1996); *Gatto v. Hoke,* 809 F.Supp. 1030. 1039 (E.D.N.Y.) ("counsel's failure to object to the prosecutor's summation represents his tactical decision to avoid underscoring the prosecutor's statements so as to draw the jury's attention to them"), *affd mem.,* 986 F.2d 500 (2d Cir.1992). *But see Washington v. Hofbauer,* 228 F.3d 689, 706 (6th Cir.2000) ("[Counsel's] explanation that he was worried the objection would render damage that an instruction could not cure is clearly not viable, for two reasons. First, accepting as a proper trial strategy a lawyer's doubts over the effectiveness of objections and curative instructions would preclude ineffectiveness claims in every case such as this, no matter how outrageous the prosecutorial misconduct might be. In

> other words, were we to accept the State's argument, no failure to object could ever comprise ineffective assistance of counsel, and no claim of prosedutorial misconduct, however egregious, could be raised on habeas review if not objected to. Second, we must presume that juries follow their instructions.").

The Court cannot say that the First Department's decision denying Quinones' ineffective assistance claim on this ground was an "unreasonable application" of the *Strickland* standard.

c. *Morris' Failure to Object to Hearsay that the "Puerto Rican Did It"*

Quinones asserts that Morris erred by failing to object to Officer Ramos' testimony that he heard an unidentified woman at the crime scene yell "something lilce": "'The Puerto Rican did it. The Puerto Rican shot him." '(Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 3 6-37, 45, citing Ranios: Tr. 575-81.)

The State does not even attempt to argue that this statement was admissible (Dkt. No. 6: State Appendix Ex. C: State 1st Dep't Br. at 18), as it consisted of hearsay from an unlcnown declarant with no indicia of reliability. *See, e.g.,* People v. Alexander, 173 A.D.2d 296, 298. 569 N.Y.S.2d 689, 691 (1st Dep't 1991) (Reversible error to permit police officer "to testify that the crowd outside the complainant's apartment building told [the officer] that they had seen defendant [in burglary case] climb out of the second floor window onto the fire escape." "Although the spontaneous declaration exception to the hearsay rule applies to statements made by bystanders as well as participants, where, as here, there is no proof of the identity of the declarants or of whether they had an 'adequate opportunity to observe' the event, it is error to permit such testimony.") (citations omitted); People v..

Lopez, 123 A.D.2d 399, 399-400, 506 N.Y.S.2d 600, 601 (2d Dep't 1986) ("error was committed by the trial court when it ... allowed a police officer to testify that certain individuals at the scene of the incident, who did not testify at the trial, identified the defendant as the perpetrator"), *afJ'd*, 69 N.Y.2d 975, 976, 516 N.Y.S.2d 660, 660 (1987).

Instead, the State maintains that Morris' "decision to refrain from objecting to this testimony most probably was a strategic one, to permit the jury to hear this possibly exculpatory material." (State 1St Dep't Br. at 18.) Scarlett testified that the man--whom she identified in court as Quinones--speaking to Carter prior to the shooting was "light-skinned Spanish." (Scarlett: Tr. 474.) Although Deans testified on direct examination that the shooter was "very fair-skinned" (Deans: Tr. 427), on cross examination she stated that the shooter's hair was "shaved off," like "an average Black man" (Deans Tr. 452). In the State's view, the hearsay that a "Puerto Rican" did the shooting served as further "[cjonflicting testimony as to the shooter's race." (State 1St Dep't Br. at 18.) The State therefore argues that it was reasonable for Morris to highlight this conflicting testimony, and, at minimum, admission ofthe statement did not harm Quinones' case. (State 1st Dep't Br. at 18.)

*51 The State's theory is patent nonsense. As the State notes elsewhere in its First Department brief (State 1st Dep't Br. at 27), Morris argued on summation that Deans' cross-examination testimony that the shooter was a "Black man" exculpated Quinones, who was apparently a "light-skinned Hispanic" [FN79] (Defense Summation: Tr. 659). [FN8O] Further, Morris attempted to impeach Officer Ramos as to the "Puerto Rican" statement by eliciting that the "alleged[ ]" statement was not contained in Ramos' notes, questioning whether Ramos really could remember such an oral statement three years after the fact, and noting that the police had failed to detain the woman who "allegedly" made the statement.

(Ramos: Tr. 578-83.) Clearly, Morris' strategy was not to embrace the veracity of Ramos' hearsay statement. Indeed, given Scarlett's testimony regarding a "light-skinned *Spanish"* man (Scarlett: Tr. 474), Deans' direct testimony regarding a "very fair-skinned" man (Deans: Tr. 427), and Quinones' *Hispanic* surname and evident appearance as a "light-skinned *Hispanic"* (Defense Summation: Tr. 659), it could hardly have benefitted Quinones' case to admit further eyewitness testimony through Officer Ramos that the shooter was *Hispanic, i.e.,* a "Puerto Rican" (Ramos: Tr. 575-76).

> [FN79]. Morris' summation itself distorted Deans' testimony, as she merely stated that the shooter's hair was done in the style of "an average Black man," apparently meaning "shaved off," not that the shooter was a Black man.
>
> [FN8O]. If, as the State seems to assert, Quinones actually had the appearance of a "Black man" rather than an Hispanic, then Morris was egregiously inept for failing to highlight to the jury the would-be exculpatory testimony from Scarlett and Deans that the shooter was a "very fair-skinned" man and a "light-skinned Hispanic." Moreover, in its summation, the State emphasized Scarlett's testimonythatthe shooter was a "light-skinned Hispanic man" (State Summation: Tr. 686), which would not have helped the State's case if Quinones actually looked like a "Black man." Similarly, in finding that the two pretrial photo arrays shown to Deans and Scarlett had been proper, the trial court noted approvingly that "[e]ach of the photo arrays have men who appear to be Hispanic." (H.52.) Quite clearly, Quinones had an "Hispanic" appearance.

It is true that a reasonable attomey sometimes refrains from objecting to damaging testimony, where the statement itself

is fleeting and might have escaped the jury's notice, and the objection and any ensuing curative instruction would only highlight the damaging testimony. *(See* cases cited at page 103 n. 78 above.) in this case, however, Officer Ramos' hearsay testimony was more than a fleeting reference that would have escaped the jury's notice. (Ramos: Tr. 575-76.) More importantly, on cross-examination, Morris wentto great lengths to attack Ramos' memory of the statement (Ramos: Tr. 578-83), thus highlighting the damaging testimony to the jury (and, in the process, ensuring that the jury understood the testimony to be inculpatory). It appears that Morris had absolutely no strategic reason not to have objected to the statement's admission and ask for a curative instruction. [FN81]

[FN81].See, *e.g.*, *Henryv. Scully,* 78F.3d51, 53 (2d Cir. 1996) ("[D]efense counsel's failure to object [at three separate junctures] could not have been part of any meaningful defense strategy of which we can conceive, notwithstanding the government's after-thefact claim to the contrary."); *DeLuca v. Lord,* 77 F.3d 578. 588 (2d Cir.1996) (Counsel's "abandonment of [a particular] defense was so hasty and based on so little, that in light of the obvious likely benefits that could be gained from the defense, his decision cannot be considered either a reasonable professional judgment or a reasoned strategic choice."), *cert. denied,* 519 U.S. 824, 117 S.Ct. 83 (1996) *see also Eze v. Senkowski.* 321 F.3d 110, 137 (2d Cir.2003) ("It does not appear that offering any of this evidence or advancing any of these arguments would have interfered with the defense's ability to make other arguments."); *Jackson v. Leonardo,* 162 F.3d 81, 85 (2d Cir.1998) (Granting habeas writ where counsel failed to assert "sure winner" on appeal. "We cannot conceive of how making such an argument could possibly have interfered with the

making of any other arguments that were available" to petitioner.).

Nevertheless, the Court cannot say that this error (by itself) prejudiced Quinones. Scarlett identified Quinones at trial as the person having a discussion with Carter some five to ten minutes before the shooting, and Deans identified Quinones in a lineup (but not at trial) as the shooter. There really was no doubt as to the shooter's ethnicity--just whether or not the Hispanic shooter was Quinones. The hearsay that "the Puerto Rican shot" Carter added little or nothing to the case. This error (standing alone) was not prejudicial.

d. *Morris' Failure to Object to Testimony that Quinones was Arrested by Members of the Career Criminal Apprehension Unit*

Quinones claims that Morris erred by failing to object to Detective Miian's testimony that Quinones was arrested by the "Career Criminal Apprehension Unit." (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 45, citing Milian: Tr. 527.) As the trial judge later noted, the name of the unit might suggest to the jury that defendant is a "career criminal." (Tr. 593.)

*52 Morris should have anticipated from identical statements at the *Wade* hearing that this testimony would arise at trial. (Milian: H. 31; Balzan: H. 41.) There is no doubt that an objection (or better, a pretrial motion in limine) would have been sustained, as the judge: (1) expressed "surprise" that Morris "didn't raise [the issue] earlier" (Tr. 592); and (2) once Morris raised the issue, ordered the State to avoid the "career criminal" testimony going forward (Tr. *592-94).*

e. *Morris' Failure to Object to Scarlett's Testimony that the Shooter was "Upset"*

Quinones asserts that Morris erred by failing to object to Scarlett's "conclusory" testimony that the man talking to her boyfriend prior to the shooting was "upset." (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dept Br. at 45, citing Scarlett: Tr. 476.) The Court disagrees, as this appears to be the sort of "lay opinion" that courts commonly deem admissible. *See* Blake v. *People*, 73 *N.Y.* 586 (1878); *People* i *Roldan*, 211 A.D.2d 366, 369, 627 N .Y.S.2d 1014. 1016 (1st Dep't 1995) ("lay opinion is properly received in evidence. Familiar examples, given in Richardson, *Evidence* § 364 (Prince 10th ed), are whether a person is angry or jesting, vigorous or feeble, sober or intoxicated, the estimated age of another, the genuineness of handwriting, the identity of a briefly seen perpetrator or his telephone voice, etc."), *affd,* 88 N.Y.2d 826. 643 N.Y.S.2d 960 (1996) 33 N.Y.Jur.2d *C'riminal Law,* 1987 (2002) ("A lay witness may testify as to his impressions of the emotional state of another person, including his observations as to whether such person seemed nervous, excited, angry, or feigning anger."); *see also* 4 *Weinstein's Federal Evidence* § 701.02 atp. 701-6 (2d ed.2003) (same rule for lay opinionunder Federal Rules of Evidence). Thus Morris did not err in failing to object, since the testimony was not objectionable.

f. *Morris' Failure to Object to Deans' Hearsay Statements at Lineup*

Quinones claims that Morris erred by failing to object when Detective Milian testified that when Deans saw the lineup, "she immediately began to shake, and she said 'Oh, my God. Oh, my God. It's him." (Dkt. No. 1:
Pet. Ex. A: Quinones 1st Dep't Br. at 45-46, citing Milian: Tr. 531.) As Quinones points out (Quinones 1st Dep't Br. at 46), Morris should reasonably have anticipated such trial testimony given that the detective testified to the same effect at the *Wade* hearing (Milian: H. 19-20). Thus, the State cannot reasonably argue that Morris decided not to object in

order to avoid emphasizing the damaging testimony. It is not clear, however, that such testimony was objectionable. In *People v. Grubbs*, 112 A.D.2d 104, 492 N.Y.S.2d 377 (1st Dei't), *appeal denied*, N.Y.2d 615, 494 N.Y.S.2d 1037 (1985), a detective testified at trial that the victim, upon recognizing her alleged attacker at a subway station several days after the attack, "became very, very nervous," "started breathing heavy, saying, 'oh my God,'""appeared to have gone into shock," and "was standing very stiff, shaking. Her mouth was wide open. Her eyes were wide open." 112 A.D.2d at 104-05, 492 N.Y.S.2d at 378. The First Department reversed:

*53 The sole reason for eliciting [the detective's] observations of the complainant's physical reactions upon viewing the accused was to bolster her identification testimony. The admission of such testimony was error. *(People v. Trowbridge.* 305 N.Y. 471. 113 N.E.2d 841.) It is of no consequence that the detective described onlythe physical reaction of the complainant and did not relate any oral statement or contemporaneous utterance made by her at the time of the arrest. *(People v. Mobley*, 56 N.Y.2d 584, 450 N.Y.S.2d 302, 435 N.E.2d 672.). The witness' statements to the effect that the complainant became nervous and upset and appeared to go into shock were undoubtedly meant to convey complainant's fear and revulsion upon confronting the person who had sexually assaulted her. As such, his testimony tended to reinforce the trustworthiness of the complainant's in-court identification of defendant as the perpetrator, the sole testimony on that issue presented by the prosecution on its direct case. *Id.* at 105, 492 N.Y.S.2d at 378-79.

The *Grubbs* holding, however, appears to be based on the inadmissibility of pre-trial identification testimony to bolster an identification at trial, as evidenced by the authorities cited. Similarly, in *People v. Echavarria*, 167 A.D.2d 138, 140. 561 N.Y .S.2d 226, 227 (1st Dept 1990) (the only relevant

decision cited by Quinones in this or the state proceeding), counsel was found ineffective because, along with a host of other errors, he failed to object" [w]hen the prosecutor asked the witness for her reaction upon seeing defendant's photograph, she stated that she started crying and 'got chills up and down my body." 'That holding, again, appears to have been based solely on the inadmissibility of bolstering pre-trial identification testimony.

Here, by contrast, pre-trial identification testimony was properly admissible, as noted at Point V.B.2.a above. Thus, this Court cannot conclude the Morris erred by failing to object. *See, e.g.,* United States v. Arena, 180 F.3d 380. 396 (2d Cir.1999) ("Failure to make a meritless argument does not amount to ineffective assistance."), *cert. denied,* 531 U.S. 811, 121 S.Ct. 33 (2000); *Aramas v. Donnelly,* 99 Civ. 11306. 2002 WL 31307929 at *14 & n. 25 (S.D.N.Y. Oct. 15. 2002) (Peck, M.J.) (same, collecting cases).

3. *Quinones' Claim That Morris Asserted Ineffective Arguments*

Quinones assigns a variety of errors to Morris' performance at the *Wade* hearing. (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 46-47.) There is no need to catalog these alleged errors, however, as there is no reasonable probability that they affected the outcome; the evidence was overwhelming in favor of admitting Scarlett's and Deans' identification of Quinones. *See* Stricklandv. Washington, 466 U.S. 668, 697. 104 S.Ct. 2052, 2069 (1984) ("there is no reason for a court deciding an ineffective assistance claim ... to address both components of the [ineffective counsel] inquiry if the defendant makes an insufficient showing on one.").

*54 Quinones also complains that although Morris asked both Scarlett and Deans to describe the shooter's height, he failed to actually put *Quinones'* height on the record.

(Quinones 1st Dep't Br. at 47.) Quinones' complaint is without basis. When Scarlett described the shooter as "[t]aller than" herself *(i.e.,* over five feet, six inches), Morris asked Quinones to stand up. (Scarlett: Tr. 490-91.) Scarlett then stated "[h]e seemed taller to me" (Scarlett: Tr. 491), effectively distinguishing Quinones from the shooter. Deans, by contrast, describedthe shooter as "tall"--"5'6", 57"." (Deans: Tr. 427, 435-36.) Morris may have decided that since Quinones was, in fact, 5'6", it would not help his case to record Quinones' actual height on the record. Certainly, the jury was able to observe Quinones' actual height, even if his height is not recorded for purposes of the appellate (and habeas) record. There is no error here.

4. *Quinones' C'laim that Morris Failed to Call Key Witnesses*

Quinones argues that Morris erred by failing to call Deans' daughter, who *"might* have testified that the shooter was not Quinones." (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 48, emphasis added.) Specifically, Quinones asserts that Morris "informed the judge that [Deans'] daughter had told him that Quinones was not the person who did the shooting." *(Id.,* citing Tr. 448.) Despite this, the daughter's "name was not on the list of possible witnesses prior to voir dire." (Quinones 1st Dep't Br. at 48, citing Tr. 22.)

Quinones is mistaken as to both the facts and the law. As to the facts, it is far from clear that the daughter told Morris that Quinones was not the shooter. On hearsay grounds, the judge quashed Morris' question to Deans: "[a]re you aware of the fact that your daughter said that this is not the person who was there at the time?" (Deans: Tr. 446-48.) Subsequently, outside the jury's presence, Morris explained to the judge that "[h]er daughter spoke with me." (Deans: Tr. 447.) That is not a clear statement by Morris that the daughter gave an exculpatory statement. Indeed, Morris' questions to Deans

could have been nothing but a crafty effort to put doubt in the jurors' minds where no real exculpatory evidence existed. On summation, Morris convincingly argued that Deans' daughter "really knew who the shooter was," thus implying that the prosecution was hiding the truth by failing to call her. (Defense Summation: Tr. 663-64.)

Moreover, Quinones has come forward with no other evidence--such as an affidavit from the daughter--proving that the daughter could exonerate Quinones or would have been willing to testify. [FN82] "A petitioner may not merely allege that certain witnesses 'might' have supplied relevant testimony, but must state exactly what testimony they would have supplied and how such tetimony would have changed the result." *Rosario v. Bennett.* 01 Civ. 7142,2002 WL 31852827 at *33 & n. 59 *(S.D.N.Y.* Dec. 20, 2002) (Peck, M.J.) (citing cases); *see, e.g., Lcni'rence v. Armontrout,* 900 F.2d 127, 130 (8th Cir.l990) ("To affirmatively prove prejudice [from counsel's failure to investigate], a petitioner ordinarily must show not only that the testimony of uncalled witnesses would have been favorable, but also tnat those witnesses would have testified at trial. Moreover, if potential trial witnesses are not called to testify at a postconviction review hearing, the petitioner ordinarily should explain their absence and 'demonstrate, with some precision, the content of the testimony they would have given at trial." ') (citations omitted); *Lou v. Mantello,* No. 98-CV-5542, 2001 WL 1152817 at *10 (E.D.N.Y. Sept. 25, 2001) ("Habeas claims based on 'complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified [to] are largely speculative." ') (citations omitted). [FN83]

[FN82]. In fact, Quinones has a copy of what appears to be Morris' notes of his interview of Deans' daughter *(see* Dkt. No. 13: Quinones C.P.L. § 440

Reply Br. at 6 & Ex. A ¶ 40), but that information has not been submitted to this Court.

[FN83]. *See also, e.g., Polanco v. United States, 99* Civ. 5739, 94 Cr. 453, 2000 WL 1072303 at *10 (S.D.N.Y. Aug. 3. 2000) (denying claim of failure to investigate, because petitioner "does not say precisely what counsel would have learned or how counsel would have learned it"); *Muhanunad v. Bennett,* 96 Civ. 8430. 1998 WL 214884 at *1 (S.D.N.Y. Apr. 29. 1998) ("petitioner's speculative claim about the testimony of an uncalled witness" is insufficient to show ineffective assistance oftrial counsel); *Croney v. Scully, CV-86-4335,* 1988 WL 69766 at *2 (E.D.N.Y. June 13, 1988) ("Petitioner's contention that assignment of an investigator would have been helpful to his defense is conclusory and speculative. Petitioner must show not only that the testimony would have been favorable, but also that the witness would have testified at triaL"), *aff'd,* 880 F.2d 1318 (2d Cir.1989).

*55 "[C]ounsel's decision as to 'whether to call specific witnesses--even ones that might offer exculpatory evidence--is ordinarily not viewed as a lapse in professional representation.'" *United States v. Best,* 219 F.3d 192,201 (2dCir.2000)(quoting *United States v. Schmidt,* 105 F.3d 82, 90 (2d Cir.), *cert. denied,* 522 U.S. 846, 118 S.Ct. 130 (1997)), *cert. denied,* 532 U.S. 1007, 121 S.Ct. 1733 (2001) *accord, e.g., United States v. Smith,* 198 F.3d 377, 386 (2d Cir. 1999) (" 'The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." '), *cert. denied,* 531 U.S. 864, 121 S.Ct. 156 (2000). Especially given the lack of proof that Deans' daughter would have provided exculpatory testimony,

this Court cannot conclude that Morris' decision not to call her constituted ineffective assistance. [FN84]

[FN84]. In his C.P.L. § 440 motion regarding Morris' alleged conflict of interest, Quinones asserted that the conflict was demonstrated by, among other things, Morris' failure to call an exculpatory witness named Malik Abdullah Akili, who was listed in Morris' case notes as a potential witness. (Dkt. No. 20: State Am. Appendix: Quinones C.P.L. § 440 Br. at 12 & Ex. H.) In an April 23, 1997 affidavit, Akili stated that he was a friend of the victim and an eyewitness to the shooting, and that Quinones was not the shooter. (State Am. Appendix: Quinones C.P.L. § 440 Motion fix. G: Akili Aff. at 1.) Akili's affidavit is suspect, as he claims that he simply happened to overhear Quinones (whom he never met before) discussing his case in the "bullpens" of the court building while awaiting trial. (Akili Aff. at 1.) It would not be unreasonable for Morris to have decided not to call such a suspect witness. *(See* cases cited at page 114 above.) In any event, Quinones has *expressly* disclaimed any independent ineffectiveness claim based on Morris' failure to call Akili. In his Traverse, Quinones stated: "to satisPy the federal 'lapse in representation' requirement, Petitioner attached the Akili affidavit to his N.Y. C.P.L. 440 [conflict of interest] motion to demonstrate other options at Mr. Morris' disposal. [Quinones' counsel's] investigation into Petitioner's claim of innocence did not involve the Alcili affidavit, neither was the Akili affidavit relied upon as an *independent* ground for relief." (Did. No. 22: Traverse ¶ 9; *see also* Dkt. No. 16: Quinones C.P.L. § 460 1st Dep't Br. at 6 & nn. 4-5.) Quinones' C.P.L. § 440 papers mention other witnesses whom Morris allegedly failed to call, such as Nathaniel Battle. (Quinones C.P.L. § 440 Br. at 13-

15 & Ex. H.) Quinones, however, offers no evidence that these witnesses could offer exculpatory testimony, other than the fact that their names were in Morris' case notes as potential witnesses. *See, e.g.,* Rosariov. Bennett, 2002 WL 31852827 at *33 & n. 59 (& cases cited therein). Moreover, Quinones relies on Morris' failure to call these witnesses only in support of his conflicted counsel claim and not to show general ineffectiveness. *(See* Did. No. 16: Quinones C.P.L. § 460 1st Dep't Br. at 6 & n. *5.)* Accordingly, because Quinones does not claim Akili or these other witnesses as "an *independent* ground for relief," and Quinones' First Department brief on direct appeal, upon whichhis habeas Petition relies, mentions only Deans' daughter as a missing witness in his general ineffective assistance claim, this Court will not consider Quinones to have asserted an independent habeas claim for ineffectiveness of counsel based on the failure to call witnesses other, than Deans' daughter.

5. *Quinones' Claim that Morris Failed to Object to the State 'is' Improper Summation*

Quinones faults Morris for failing to object to a number of allegedly improper statements and arguments in the prosecutor's summation. (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at *48-51.)*

a. *Morris' Failure to Object to the Prosecutor's Statement that Quinones Could Have Called Deans' Daughter as a Witness*

Quinones claims that Morris erred by failing to object to the prosecutor's improper statement implying that Quinones had the obligation to call Deans' daughter as a witness-- effectively shifting the burden of proof: [Deans] didn't tell

you about her daughter. She doesn't want her daughter involved in this.
Well, if her daughter knew something differently, [Morris] certainly knew where to find her based on his cross examination. And if he wanted her here, he could subpoena her here.
(State Summation: Tr. 679, *cited in* Quinones 1st Dep't Br. at *50.)*

The prosecutor's statement does not appear to violate the federal constitution. Although the government may not "suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatever" *Unites States v. Parker,* 903 F.2d 91, 98 (2d Cir.1990), the prosecutor is entitled to comment on a defendant's failure to call witnesses to contradict the' factual character of the government's case, as well as his failure to support his own factual theories with witnesses. A constitutional violation occurs only if either the defendant alone has the information to contradict the govermnent evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify. *United States v. Bubar,* 567 F.2d 192. 199 (2d Cir.) (citations omitted), *cert. denied,* 434 U.S. 872, 98 S.Ct. 217(1977) *accord, e.g., UnitedStates v. Salameh,* 152 F.3d 88. 136 (2d Cir.1998), *cert. denied,* 525 U.S. 1112, 119 S.Ct. 885 (1999); *United States v. Caccia,* 122 F.3d 136, 140 (2d Cir.1997); *United States v. Yuzary, 55* F.3d 47, 53 (2d *Cir.1995); United States v McDermott,* 918 F.2d 319, 327 (2d Cir.1990), *cert. denied,* 500 U.S. 904, 111 S.Ct. 1681 (1991). Thus, "there is no deprivation of a defendant's constitutional rights by permitting the jury to draw an adverse inference against him for his failure to call an available material witness," where the witness was available to both prosecution and defense. *United States v. Caccia,* 122 F.3d at 140 *accord, e.g., United States v. Munoz,* No. 95-1070, 122 F.3d 1057 (table), 1995 WL 595088 at *2 (2d Cir. Sept. 14, 1995) ("[I]f both parties had access to the

uncalled witness, 'the failure to produce is *open* to an inference *against both parties.'* ... The prosecutor's suggestion that the jury draw this inference against the defendant was not improper."); *United Slates v. Nichols,* 912 F.2d 598, 601-02 (2d Cir.1990'); *Marchese v Senkowski,* No. 97-CV-2055, 1999 WL 731011 at *fl (E.D.N.Y. Sept. 15, 1999).

*56 It is unclear whether New York has a similarly expansive rule. [FN85] Even if the prosecutor's statement would not ordinarily be permissible under New York law, however, Morris' statements "opened the door," rendering the prosecutors statement unobjectionable. Both in his cross-examination of Deans (Deans: Tr. 442-48) and Detective Milian (Milian: Tr. 540- 41) and in his summation (Defense Summation: Tr. 662-64), Morris implied that the State was hiding Deans' daughter, "the person who really knew who the shooter was in this case" (Tr. 663). Under New York law, the prosecutor had the right to respond by pointing out that Morris had subpoena power as well. *See People v. Youmans,* 292 A.D.2d at 648. 738 N.Y.S.2d at 757 ("the prosecution may comment upon the failure to present a certain witness where it is a fair response to defense counsel's summation"), *appeal denied,* 98 N.Y.2d 704. 747 N.Y.S.2d 423 (2002); *People v. Guillebeaux,* 229 A.D.2d 399, 399.645 N.Y.S.2d 59,60 (2dDep't) ("The prosecutor's comments about the defendant's failure to present a certain alibi witness were a fair response to defense counsel's own summation and a fair comment within 'the four corners of the evidence'.... In addition, defense counsel made his own summation comments on the subject, and, in fact, spoke about the alibi witness's absence at greater length than did the prosecutor."), *appeal denied,* 88 N.Y.2d 1021. 651 N.Y.S.2d 20 (1996); *People v. Brown,* 216 A.D.2d 670, 674, 628 N.Y.S.2d 211, 215 (3d Dep't) ("The prosecution's reference to [witness'] failure to testify at trial was not unduly prejudicial given that such comments were made in response to defense counsel's

similar comments during his summation."), *appeal denied,* 86 N.Y .2d 791, 632 N.Y.S.2d 504 (1995); *People v. Mackey,* 52 A.D.2d 662, 662, 381 N.Y.S.2d 1004, 1005 (3d Dep't 1976) ("Defendant first contends that the prosecutor made prejudicial statements in his summation in that he referred to the subpoena power of the defendant's attorney. These remarks to the jury must be evaluated in their relationship to the defense attorney's summation which had just been concluded.... Defense counsel implied that the People failed to call certain witnesses because their testimony would have been damaging to the People's case. In view of counsel's suggestions to the jury that the prosecutor had engaged in improper conduct, the prosecutor's statement regarding defendant's subpoena powers was not improper.").

> [FN85]. State decisions have allowed prosecutors to comment on the defendant's failure to call witnesses, but only, it appears, where: (1) the defendant himself had come forward with evidence, and (2) the witnesses were available to the defendant. *See, e.g., People v. Tankleff* 84 N.Y.2d 992, 994-95, 622 N.Y.S.2d 503, 504-05 (1994) (prosecution's summation comments regarding defendant's failure to call several significant witnesses "did not constitute an imp ermissible effort to shift the burden of proof' where "the defense had elected to come forward with evidence" and all of the witnesses were available to defendant); *People v. Rodrizuez,* 38 N.Y.2d 95, 98, 378 N.Y.S.2d 665, 668-69 (1975) ("Ordinarily, a court may not comment upon a defendant's failure to testify or otherwise to come forward with evidence, but, once a defendant does so, his failure to call an available witness who is under defendant's control and has information material to the case may be brought to the jurors' attention for their consideration.... Though the rule ordinarily does not apply when a witness is equally accessible to both

> parties (Richardson, *Evidence* (10th ed.), s 92), it may come into play even then if it appears that such a witness is favorable tä one party and hostile to the other."); *People v. Youmans*, 292 A.D.2d 647,648,738 N.Y.S.2d 756, 757 (3d Dep't), *appeal denied*, N.Y.2d 704, 747 N.Y.S.2d 423 (2002); *People v. Neroni*, 280 A.D.2d 497, 497, 720 N.Y.S.2d 522, 522 (2d Dep't), *appeal denied*, 96 N.Y.2d 832, 729 N.Y.S.2d 453 (2001); *People v. Wood*, 271 A.D.2d 705, 705, 707 N.Y.S.2d 184, 185 (2d Dep't), *appeal denied*, 95 N.Y.2d 873, 715 N.Y.S.2d 228 (2000); *People v. Diaz*, 254 A.D.2d 94, 94, 682 N.Y.S.2d 123, 123 (1st Dept 1998). *appeal denied*, 93 N.Y.2d 852, 688 N.Y.S.2d 499 (1999).

Because the prosecutor's statement was not improper, it was not error for Morris to refrain from objecting.

b. *Morris' Failure to Object to the P,'osecutor's Assertion That Morris Failed to Support The Factual Theories He Espoused in his Opening Statement*

In a similar vein, Quinones argues that Morris should have objected to the prosecution's assertion "that the defense had failed to produce evidence to support the opening statement contention that Carter was a drug dealer killed by his partner." (Dkt. No. 1: Pet. Ex. A:
Quinones 1st Dep't Br. at 50, citing Tr. 672-73.) While it is true that it would have been objectionable for the prosecutor to assert that Quinones failed to sustain some burden of producing evidence, [FN86] a close reading of the state's summation reveals that the State never claimed that defendant bore the burden of proof, but merely pointed out that no evidence supported Morris' theories:

> [FN86]. *See People v. Hopper*, 277 A.D.2d 171, 172. 717 N.Y.S.2d 123. 124 (1st Dep't 2000) ("While we

are perturbed by the prosecutor's comment on defendant's failure to prove certain matters mentioned in defense counsel's opening statement, which had been stricken, the comment does not warrant reversal in light of the court's instructions on the burden of proof, which instructions the jury is presumed to have followed ...."), *appeal denied,* 96 N.Y .2d 830, 729 N.Y.S.2d 451 *(200 fl;Peopiev. Brown,* 91 A.D.2d 639, 640, 456 N.Y.S.2d 821, 822 (2dDep't 1982) (Reversing because, *inter alia,* prosecutor "continually commented upon defense counsel's failure to prove certain things he had mentioned in his opening statement. We have held in the past that such conduct is improper inasmuch as the prosecutor is, in effect, suggesting to the jury that the defendant had the burden ofproving his innocence."); *People v. Knalz,* 76 A.D.2d 889, 890, 428 N.Y.S.2d 709, 711 (2d Dept 1980) (listing a variety of errors requiring reversal, including "the prosecutor's reference to defense counsel's failure to prove certain things which defense counsel mentioned in his opening statement").

*57 Now, I want to talk a little bit about what Mr. Morris has talked about. I submit to you he's raised a number of what I submit are nonissues.

First of all, with regard to Ed Smith--this is ... in his opening--he was going to demonstrate to you that this was a drug dealer who was killed by his partner and that his partner in essence had this defendant framed. There isn't a bit of evidence of that whatsoever in this case. Pure speculation. Pure surmise.

Did you hear one bit of evidence that said that this deceased was killed by somebody else and that they brought in Carol Deans and Marion Scarlett to participate in this frame?

There isn't a bit of evidence whatsoever about that.
He promised you the world. He delivered nothing.
(State Summation: Tr. 672-74.)

While the final statement about Morris "deliver[ing] nothing" may have skated along the thin line of propriety, it was not objectionable for the State to point out that the evidence did not support Morris' theories. *See, e.g.,* United States v. Bautista, 23 F.3d 726, 733 (2d Cir.) ("[T]he government may comment on a defendant's failure to call witnesses to support his factual theories. The government may not, however, go further and suggest that the defendant has the burden of producing evidence. The challenged [prosecutor's] statement, although inapt, when considered in context would not have been understood by a reasonable jury as anything more than an argument that the jury need not believe uncorroborated defense theories."), *cert. denied,* 513 U.S. 862, 115 S.Ct. 174 (1994). Accordingly, Morris cannot be faulted for failing to object. *See, e.g.,* Franza v. Stinson, 58 F.Supp.2d 124, 148-49 (S.D.N.Y.1999) (Kaplan, D.J. & Peck, M.J.) (counsel not ineffective for failing to object to unobjectionable summation by prosecutor) (collecting cases); *see also, e.g.,* Rosario v. Bennett, 01 Civ. 7142, 2002 WL 3 1852827 at *35 & n. 61 (S.D.N.Y. Dec. 20, 2002) (Peck, M.J.) ("counsel cannot be faulted for failure to malce a meritless objection" to an unobj ectionable jury charge) (collecting cases). This is especially true in light of the trial court's clear instructions to the jury that the prosecution had the burden of proof and the "defendant is never required to prove anything." (Charge: Tr. 7 10-17.) *See, e.g.,* Lugo v. Kuhlmann, 68 F.Supp.2d 347, 369-70 (S.D.N.Y.1999) (Peck, M.J.) (collecting cases).

c. *Morris' Failure to Object to the Prosecutors' Repeated Distortions of the Record on Summation*

Quinones asserts that Morris failed to object to the prosecutor's repeated distortions of the record on summation.

(Dkt. No. 1: Pet. Ex. A: Quinones 1st Dept Br. at 48-5 1.)
The New York Court of Appeals has described the standard for reviewing prosecutor summations:
[A]lthough counsel is to be afforded 'the widest latitude by way of comment, denunciation or appeal in advocating his cause' summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command. There are certain well-defined limits.

*58 It is fundamental that the jury must decide the issues on the evidence, and therefore fundamental that counsel, in summing up, must stay within 'the four corners of the evidence' and avoid irrelevant comments which have no bearing on any legitimate issue in the case. Thus the District Attorney may not refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence. Above all he should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant. *People v. Ashwal*, 39 N.Y.2d 105, 109-10, 383 N.Y.S.2d 204, 206-07 (1976) (citations omitted) (conviction reversed because "prosecutor's [summation] remark definitely conveys the impression that [informant] was killed by those he had informed upon, one of whom was this defendant"; prosecutor may not "try to convey to the jury, by insinuation, suggestion or speculation, the impression that the defendant is guilty of other crimes not in issue at the trial"); *see,* e.g., *People v. Galloway*, 54 N.Y.2d 396,399,446 N.Y.S.2d 9, 11 (1981) ("the prosecutor's characterization, in summation, of the defense's contention that the witness possessed a gun as a 'smokescreen' or 'a red herring' and his aspersions on the credibility of the defendant's and [another witness'] testimony did not exceed the broad bounds of rhetorical comment permissible in closing argument"). [FN87]

[FN87]. *See also, e.g., People v. Harris*, 98 N.Y.2d 452, 492 n. 18, 749 *N.Y.S.2d* 766, 786 n. 18 (2002) ("Defendant argues that the prosecutor invited the jury to punish defendant for exercising his rights to a trial and not to testify, that the prosecutor misstated the record, referred to facts not in evidence, and misused evidence, and that the prosecutor denigrated defendant's defense and inflamed the jury." Although the issues were unpreserved, "[i]f we were to review them we would conclude that those statements do not 'exceed the broad bounds of rhetorical comment permissible in closing argument'...."); People v. *DeJesus*, 42N.Y.2d *519*, 526, 399 N.Y.S.2d 196, 200-01 (1977) ("When an attorney in summation enlarges upon facts not in evidence or presses upon the jury subjects which its members have no right to consider, the required and proper practice for opposing counsel is to interrupt the summation for the purpose ofobjecting to the improper statements."); *People v. Taylor*, 296 A.D.2d 512, 512, 745 *N.Y.S.2d* 477, 477 (2d Dept 2002) ("[T]he challenged remarks made by the prosecution during summation constituted reversible error, as the remarks exceeded the 'broad bounds of rhetorical comment permissible in closing argument' to the extent that the prosecution distorted the facts in evidence and made comments which were either inflammatory, speculative, or concerned matters not in evidence."); *People v. Shaw*, 228 A.D.2d 291, 293, 644 N.Y.S.2d 208, 209 (1st Dep't 1996) ("the comment to which defendant now objects--that in the half-hour interval between the robbery and the appearance ofdefendant and his accomplice at a nearby hospital for a gunshot wound to defendant, they could have secreted the guns used and money stolen during the robbery-was inferable from the evidence and proper response to the defense summation commenting on the absence of such

> evidence as basis for reasonable doubt"), *appeal denied,* 91 N.Y.2d 1012, 676 N.Y.S.2d 141 (1998); *People v. Turner,* 214 A.D.2d 594, 594, 625 N.Y.S.2d 233. 234 (2d Dept) ("The challenged comments in the prosecutor's summation were either within the bounds of permissible rhetorical comment afforded counsel during summation, responsive to the defendant's summation, constituted fair comment on the evidence, orrelatedto matters which were fairly inferable from the evidence ...."), *appeal denied,* 86 N.Y.2d 742. 631 N.Y.S.2d 623 (1995).

The first statement that Quinones finds objectionable (Quinones 1St Dep't Br. at 48) could fairly be described as merely ambiguous: "that's what Carol Deans and Marion Scarlett did. They recognized the defendant in this courtroom and at the lineup." (State Summation: Tr. 676). Quinones argues that the prosecutor's statement is false because Deans actually failed to identify Quinones in court. (Deans: Tr.429.) However, the prosecutor's summation statement referred to both Deans *and* Scarlett, and Scarlett did identify Quinones at trial, while Deans identified him at the lineup. *(See* pages 8, 10 above.) More importantly, soon after making the above statement, the prosecutor sought to explain why Deans had *not* identified Quinones at trial (State Summation: Tr. 68 1-84), thus clearing up any ambiguity or misstatement. [FN88]

> [FN88]. Moreover, immediately after the main the jury charge (after Morris took exception), and in a later supplemental charge, the court emphasized to the jury that Deans had been unable to identify Quinones in court. (Charge:
> Tr. 753, 810-11.)

Quinones also complains about the State's assertion that "{i]f a drug dealer wants to get rid of the opposition, they kill them. They don't get the law involved in terms of framing

somebody else." (State Summation: Tr. 673; Quinones 1st Dep't Br. at *50.)* While the State's assertion as to the normal practice of drug dealers was not based on evidence in the record, it was within the bounds of fair comment on the evidence and the defense's arguments.

Quinones also finds improper (Quinones 1St Dep't Br. at 50) the State's hypothesis that although Scarlett estimated that ten to fifteen minutes elapsed between the time she saw Quinones with Carter and the time of the shooting, the elapsed time was actually "a minute or two," because the "trauma" of "losing her boyfriend" made the "incident seem[] much longer [to Scarlett] than it really was." (State Summation: Tr. 690, 680.) The State's theory, while of dubious validity (given that the "trauma" to Scarlett took place after the lapse of time, not before it), was a fair comment on the evidence, as the State accurately described Scarlett's testimony, and merely hypothesized why Scarlett may have been mistaken.

*59 Finally, Quinones claims (Quinones 1st Dep't Br. at 51) that Morris should have objected to the following: But what most corroborates [the eyewitness identification testimony] is the defendant's action on August 20th of 1993 when Detective Sheridan and Detective Kaplan and their colleagues arrived at the scene. And I submit to you when this defendant saw those people approaching, he made them for police officers. You know, it's not too difficult to make plain clothes cops for who they are. He knew what they were there for. He recognized them. Those are cops. He knew what they were. And that's why he bolted. His running away was the confirmation of the identification by Carol Deans and Marion Scarlett. If he wasn't the killer, if some other person out there did it, what's he running for? He doesn't even know why the cops have arrived yet if he's innocent.(State Summation: Tr. 692-93.)

Prior to the arrest, detectives had told Quinones' wife that they were seeking Quinones in order to place him in a lineup in connection with the shooting. (Milian: Tr. 526-27.) The prosecutor's statement was fair comment on the evidence: it was a fair inference from the evidence that Quinones, who knew the police were looking for him, recognized the plain clothes detectives as police; thus his flight could be considered an indication of guilt.

c. *Morris' Failure to Object to the Prosecutor's Statement That Because Of Her Fear, Deans Did Not Come Forward Sooner, Did Not Mention that her Daughter Saw the Shooting, and Was Unable to Identy5' Quinones as the Shooter*

Quinones asserts that the prosecutor had no evidentiary basis for claiming that Deans failed to talk to the police at the scene because she was afraid, and failed to testify on direct regarding her daughter being present because she was trying to protect her daughter. (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 48-50, citing State Summation: Tr. 676-78.) In addition, Quinones asserts that the statements were improper because state courts have reversed convictions where the prosecution has even implied that the defendant had threatened witnesses. [FN89]

[FN89]. *See People v. Facciolo*, 288 A.D.2d 392, 394, 734 N.Y.S .2d 179, 182 (2d Dep't 2001) ("[R]eversal is warranted because the prosecutor repeatedly argued during his summation that the four prosecution witnesses who were inside the produce store when the shooting occurred were reluctant to testify against the defendant, and implied that he had

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threatened them. These comments were not within the 'four corners of the evidence'.... *People v. Rivera*, 160 A.D.2d 267, 272, *553* N.Y.S.2d 707, 711 (1st Dep't 1990) ("[T]he prosecutor's summation, which repeatedly alluded to [complainant's] fear and threats to his safety, ventured far beyond 'the four corners of the evidence,' and forayed well past what we consider to be an appropriate response to defense counsel's summation."); *Peopiev. Heppard*, 121 A.D.2d 466, 468, 503 N.Y.S .2d 153, 155 (2d Dep't) ("We are disturbed, however, by the remarks made by the prosecutor during summation that strongly implied that the defendant had done something to put [eyewitness] in fear of testifying, when in fact no testimony had been adduced that [eyewitness] or anyone in her family had been threatened in any way. It is basic that on summation the prosecutor must stay within 'the four corners of the evidence' and not make reference to matters not in evidence ..., and we fmd the departure from that rule exhibited in this case to be highly improper."), *appeal denied*, 68 N.Y.2d 813. 507 N.Y.S.2d 1030 (1986); *People v. Lozada*, 104 A.D.2d 663. 664-65, 480 N.Y.S.2d 117. 118-19 (2d Dep't 1984) ("[A] new trial is required because of certain improper comments made by the prosecutor in summation concerning threats made by the defendant against prospective witnesses. Although under certain circumstances evidence of threats against a witness may establish 'consciousness of guilt' and be admissible against an accused, here the prosecutor asked the defendant whether he had threatened the lives of witnesses and received a negative response. No evidence was adduced to controvert this answer. It is a basic proposition that the prosecutor, in summing up, must stay within 'the four corners of the evidence' and reference may not be made to matters not in evidence.") (citations omitted).

In this case, however, the prosecutor merely stated that Deans failed to mention her daughter because she was "being protective ... [s]he did not want her daughter involved inthis." (State Summation: Tr. 677-79.) As for Deans herself not contacting the police earlier, the prosecutor explained that Deans was nervous and upset. She really did not want to be forced on that witness stand. Nobody wants to testify. Think of yourselves when you're being voir dired in this case. Many of you I'm sure were a little nervous when we were questioning you. That's different than being a witness, a witness who basically has to confront the person she saw do the shooting. She was traumatized by what happened. She was scared of what happened. And she certainly wasn't going to run forward in front of everybody in the street and say "I saw this," and take whatever risk that that entails.

*60 (State Suimnation: Tr. 678-79.) The statement that Deans was afraid of coming forward because of "whatever risk that that entails" appears to merely state the obvious--that witnesses to criminal acts commonly may be nervous about getting involved.

Quinones also faults Morris for failing to object when the prosecution claimed that Deans failed to identify Quinones in court because of "fear":
So, there's no reason for [Deans] to lie. But certainly if she was going to lie, if she was hell bent on getting the defendant, the way you do it is come into this court and say "Yeah; that's the man I saw doing the shooting." Instead what happened, I submit to you, just like at the lineup, she froze. She was scared. (State Summation: Tr. 68 1-82.)

The prosecutor's statement was patently improper, as the First Department explained in identical circumstances:
It was blatantly improper for the prosecutrix to suggest that the victim's inability to make an in-court identification was due to fear, not an inability to recognize, especially since the

People had been permitted, pursuant to CPL 60.25, to introduce third-party testimony about a prior out-of-court identification by the victim. Third-party testimony of a prior out-of-court identification may not be admitted where the eyewitness's failure to make an in-court identification is predicated on fear.... Thus, the People would have it both ways, utilizing the CPL 60.25 exception based on the victim's present inability to recognize the perpetrator and, at the same time, suggesting that the victim's failure to make an identification was due to fear. *Feopiev. Weeks*, 156 A.D.2d 133, 1 ', 548 N.Y.S.2d 179, 180 (1st Dey't 1989), *appeal denied*, /5 N.Y.2d 819, 552 N.Y.S.2d 569 (1990). [FN9O]

[FN9O]. The prosecutor's statement also contradicted the evidence, as Deans testified that she could not identify Quinones because she "just had sort of a profile" (Deans: Tr. 429), not because of fear.

Morris, however, did object to the prosecutor's assertion regarding Deans' failure to identify Quinones, and was promptly overruled. (State Summation: Tr. 682.) [FN9I] The prosecutor then went on to develop, in some detail, his unsupported theory that Deans "suppressed" her memory ofthe shooting out of fear: "I submit to you in her trauma and her fear she suppressed her recollection of the defendant. She did not want to remember. And so, two years ago after that lineup she suppressed it. But it was fear and fright that made her unable to identify the defendant in this court." (State Summation: Tr. 682- 84.) While these statements were certainly objectionable, Morris can hardly be faulted for failing to lodge yet another objection so soon after the trial court overruled his earlier objection to the same line of reasoning. *See*, e.g., *Bennett v. Anelone*, 92 F.3d 1336, 1349 (4th Cir.) ("[R]efraining from objecting to avoid irritating the jury is a standard trial tactic."), *cert. denied*, 519 U.S. 1002. 117 S.Ct. 503 (1996); *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir.1994) ("Counsel's decision to object during the

prosecutor's summation must take into account the possibility that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds. Thus, the question we have to ask is not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection. In this case, defense counsel's decisions not to object to the comments were reasonable.").

> FN91. This was Morris' only objection during the State's summation.

6. Quinones' Claim that Morris Failed to Object to the Trial Court's Erroneous Marshaling of the Evidence

*61 Quinones faults Morris for failing to object to the trial judge's allegedly erroneous marshaling of the evidence during the jury charge. (Dkt. No. 1: Pet. Ex. A: Quinones 1st Dep't Br. at 5 1-52.)

In the main jury charge, the court stated that: "Ms. Scarlett testified that within minutes of his being shot, the defendant was having some kind of a dispute or agitated discussion with the deceased, Lamont Carter." (Charge: Tr. 742.) [FN92]

> [FN92]. The court substantially repeated this in a supplemental charge responding to a jury note requesting the identification charge (Tr. 796): Scarlett "testified that within minutes prior to his being shot, the defendant was having some kind of a dispute or agitated discussion with the deceased, Larnont Carter." (Tr. 801.)

Quinones' principal objection to this language has some limited substance. [FN93] Scarlett testified that after Carter exited a pizza parlor, "[h]e stopped to talk to someone"

(Scarlett: Tr. 473-75), although Scarlett could not "hear what it was they were discussing at all" *(id.* 475). Scarlett approached Carter, "pulled on his sleeve and said that [she was] ready to go to the supermarket." (Scarlett: Tr. 475-76.) This caused Quinones to become "upset":

> [FN93]. Quinones also asserts that it was Ms. Scarlett's "estimate" that "[a]bout five or ten minutes" elapsed between the time she left Carter and the time of the shooting. (Scarlett: Tr. 482, *see id.* at 497.) Quinones thus assigns error to the court's characterization of the time lapse as "within minutes." (Quinones 1st Dept Br. at 52.) This Court disagrees. *Cf, e.g., Larrea v. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *25 (S.D.N.Y. May 31, 2002) (Peck, M.J.) ("It is settled law that 'when a trial court's instruction is legally correct as given, the failure to request an additional instruction does not constitute' ineffective assistance of counsel under Strickland."), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2000) (Scheindlin, D.J.).

A.... Because [Carter] had turned his attention to me and he was answering back to me, you know, about what I said.
Q. Who was answering back to you?
A. [Carter] was talking back to me, and the person he was tailcing to [Quinones] got agitated like.
Q. What did the defendant do?
A. He saidlike "Yo, I'mtalkingtoyou, man." Andhe said--and [Carter] answered him "Just cool, you know. I'm talking to my lady," and "Hold up."
Q. Now, you indicated the defendant got angry when [Carter] turned his attention to you, is that correct?
A. Yeah.
Q. What do you mean he got "agitated"? What did he do, the defendant?
A. He had his hands in his pockets. "I'm talking to you, man,

you know; we're tailcing," and sort of like that. (Scarlett: Tr. 476-79.)

Based on Scarlett's testimony, one could construe Quinones' annoyance as a normal response to being rudely interrupted--not the kind of exchange that would normally motivate a murder. As Quinones explained, "[t]he more hostile the tone of the conversation, the more credible the inference that Quinones bore ill will towards Carter and might have shothim." (Quinones 1st Dep't Br. at 52.) [FN94] Nevertheless, the court's charge language--"some kind of a dispute or agitated discussion"--cannotbe deemed erroneous. Scarlett did, after all, repeatedly describe Quinones as "agitated," and Quinones' verbal altercation could reasonably be described as a "dispute." By modifying the "dispute or agitated discussion" language with the phrase "some kind of," the court described a myriad of possibilities. Accordingly, while the charge may have failed to capture the flavor of Scarlett's testimony, the language was not truly erroneous, and thus Morris' failure to object cannot be deemed error.

> [FN94]. The court's characterization of the Quinones-Carter discussion was understandable, given that Detective Milian testified at the *Wade* hearing that Scarlett identified Quinones in the photo array by stating"'This is the guy that was involved in the fight with [Carter]." ' (Milian: H. 14; *see also* Id. at 13 ("argument"); *ii* at27 ("fight"); Id. at 49 ("fight") .) Moreover, the State repeatedly emphasized in its opening statement that Quinones and Carter had "argued," even prior to Scarlett tugging on Carter's sleeve. (Tr. 391-92.) At trial, however, Scarlett never mentioned any "fight," and certainly did not testify that Quinones and Carter were arguing when she arrived. The court and both sides' counsel apparently conflated the *Wade* and trial testimony.

However, this Court is troubled by Morris' own repeated and gratuitous references to the Quinones-Carter discussion as an "argument," both in Morris' summation (Defense Summation: Tr. 658, 666-67) and cross-examination of Scarlett (Scarlett: Tr. 488, 490, 491, 495, 497). *(See* Quinones 1st Dep't Br. at 44.) Indeed, Morris highlighted the hostile nature of the "argument" by lamely noting to the jury that" [t]here was never any threats of violence." (Defense Summation: Tr. 667.) Instead of arguing that Quinones' alleged "agitation" was a normal display of annoyance in response to a rude interruption and hardly a motivation for murder, Morris put the worst possible spin on the situation, apparently based on Detective Milian's *Wade* hearing testimony (Milian: H. 13-14). [FN95] Decisions made out of ignoralice ofthe relevant testimony cannot be characterized as "strategic" under *Strickland. See, e.g., Pavel v. Hollins,* 261 F.3d 210, 218 n. 11 (2d Cir.2001). Morris should have at least advocated an interpretation that helped, rather than undermined, his client's case.

> [FN95]. Morris also failed to object to the prosecution's repeated reference to an "argument." (State Summation: Tr. 688-89 ("As Lamont came out of the pizza parlor, that's when he's approached by the defendant, and the defendant and Lamont are having an argument. [Ms. Scarlett] doesn't know what the argument is about, and I'm not going to ask you to conjecture what the argument was about, or to speculate what the argument was about. But they were arguing."); *see also id.* at 686-87.)

*62 Quinones also claims that Morris erred by not objecting to the court's charge regarding the timing of Deans' pretrial identification. (Quinones 1St Dep't Br. at 52.) Tn its main jury charge, the court stated:

The evidence is that the crimes charged were committed on December 31, 1992. This trial is now being held some 2-1/2

years later. It is, therefore, relevant to establish that *shortly after the commission of the crimes charged while the witness' memnomy was, perhaps, fresher than at present,* Carol Deans picked out and identified this defendant, Edgar Quinones, as the perpetrator of the crime at a lineup. The People contend that such [prior identification] evidence is reliable because of the *proximity of the identjfication to the event....* However, the defendant contends that the witness Carol Deans did not actually identify the defendant but made a mistake in the identification of the defendant by identifying merely a profile. (Charge: 744-46, emphasis added.)

Immediately after delivering the main jury charge, and in response to a request by Morris that the court emphasize Deans' inability to make an in-court identification, the court delivered a supplemental charge providing, in relevant part:
[W]hen I spoke of the identification by Ms. Deans, I'm referring to the identification that she made at the lineup of August 20th of 1993....
As you are all aware, [Ms. Deans] made no in-court identification when she testified here two days ago, but she did indicate her identification which was made eight months after the event in August of 1993. (Charge: Tr. 753.) [FN96]

> FN96. During deliberations, in response to a note requesting "the identification charge" (Tr. 796), the court substantially repeated the above language:Now, you will recall that the witness Carol Deans testified that after the crime she saw and identified the defendant at a lineup on August 20, 1993, at the 25th Precinct. The evidence is that the crime charged was committed on December31, 1992. This trial is now being held some 2-1/2 years later. It is, therefore, relevant to establish that shortly after the commission of the crimes charged while the witness' memory was, perhaps, fresher than at present, Carol Deans picked out and identified this defendant as the

> perpetrator of the crime at a lineup. The people contend that [the prior identification] evidence is reliable because of the proximity of the identification to the event, itself. That is, the proximity in time as well as to the nature and the spontaneity and the circumstances of the witness' identification at that time. The defendant, however, contends that the witness did not actually identify the defendant but that she made a mistake in the identification of the defendant by identifying only a profile. (Supp. Charge: Tr. 803-04.)

The court accurately described the lineup as taking place eight months after the shooting. However, the court's characterization ofthat lapse of time as *"shortly after* the commission of the crimes charged while the witness' memory was, perhaps, fresher than at present" was erroneous. (Charge: Tr. 745.) The Supreme Court has held that "a lapse of seven months between the [crime] and the confrontation ... would be a seriously negative factor in most cases ." *Neil v. Biggers,* 409 U.S. 188,201,93 S.Ct. 375, 383 (1972). By effectively characterizing the lapse of time as insignificant, the court precluded the jury from reasonably questioning the "freshness" ofDeans' identification so long after the shooting. Morris' error in not objecting to this aspect of the charge was compounded by his failure to raise the timing issue in his summation. [FN97]

> [FN97]. This Court's criticism of Morris' performance is nonetheless tempered by the fact that the court's charge was delivered orally, and was apparently not provided to counsel for advance inspection. *See Bloomer v. United States.* 162 F.3d 187, 193 (2d Cir. 1998) (recognizing greater difficulty of perceiving error in oral jury instruction at trial than written record on appeal); *United States v. Birbal,* 62 F.3d 456, 459 n. 1 (2dCir.1995) (noting difficulty of

discerning specific flaws in oral jury charges); *Larrea v. Bennett*, 01 Civ. 5813, 2002 WL 1173564 at *27 (S.D.N.Y. May 31, 2002) (Peck, M.J.) (trial counsel's failure to object was not erroneous, especially where the trial counsel "had to make his decision without advance warning (or research help) during trial."), *report & rec. adopted*, 2002 WL 1808211 (S.D.N.Y. Aug. 6. 2000) (Scheindlin, D.J.).

7.Morris' Aggregated Errors Did Not Amount to Deficient Peiformance Prejudicing Quinones

As noted above (see page 38), any counsel errors must be considered in the "aggregate" rather than in isolation, as the Supreme Court has directed courts "to look at the 'totality of the evidence before the judge or jury." ' *Lindstadt v. Keane*, 239 F.3d 191. 199 (2d Cir.2001) (quoting *Stricklandv. Washington*, 466 U.S. 668, 695-96. 104 S.Ct. 2052, 2069 (1984)). Morris' errors included the following: (1) failing to object to Officer Ramos' testimony that he heard an unidentified woman atthe crime scene yell: "'The Puerto Rican did it" (Point V.B.2.c above); (2) failing to object to Detective Milian's testimony that Quinones was arrested by the "Career Criminal Apprehension Unit" (Point V.B.2.d above); (3) repeatedly describing the discussion between Quinones and Carter as an argument (Point V.B.6 above); and (4) failing to object to the jury charge characterizing Dean' lineup identification as taking place "shortly after" the shooting (Point V.B.6 above).

*63 *Strickland,* of course, teaches that "Uludicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. at "[AJ courtmust indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that,

under the circumstances, the challenged action 'might be considered sound trial strategy." *'Id.*

Even if Morris' actions resulted from error rather than strategy, trial counsel's performance must still be accorded a certain degree of deference, as the Sixth Amendment does not guarantee "error-free, perfect representation," *Morris v. Garvin*, No. 98-CV-4661, 2000 WL 1692845 at *3 (E.D.N.Y. Oct. 10, 2000), but merely a "wide range of professionally competent assistance," *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Quinones must show that Morris "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 *see Smith v. Robbins*, 528 U.S. 259, 284, 120 S.Ct. 746, 763 (2000) (" 'We address not what is prudent or appropriate, but only what is constitutionally compelled." ') (quoting *United States v. Cronic*, 466 U.S. 648, 665, n. 38, 104 S.Ct. 2039, 2050 n. 38 (1984)); *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 3126 (1987) (same); *Castro-Poupart v. United States*, No. 91-1877, 976 F.2d 724 (table), 1992 WL 240655 at *2 (1st Cir. Sept. 30, 1992) ("Effective assistance is not necessarily error free assistance."); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir.1989) ("petitioner was not entitled to error-free representation, only representation that fell within the range of competence demanded of attorneys in criminal cases"); *United States v. DiTommaso*, 817 F.2d 201, 216 (2d Cir.1987) (although, "[tjo put it charitably," trial counsel's performance did not "furnish{ j a full model for aspiring advocates," it did not fall outside the "wide range of reasonable professional assistance"); *Wise v. Smith*, 735 F.2d 735, 739 (2d Cir.1984) (defendant "was not entitled to a perfect defense, and the cumulative effect of the errors and omissions that we might find do not amount to a denial of effective assistance of counsel"); *Larrea v. Bennett*, 01 Civ. 5813, 2002 WL 1173564 at *26 (S.D.N.Y. May 31, 2002) (Peck, M.J.), *report & rec. adopted*, 2002 WL 1808211

(S.D.N.Y. Aug. 6, 2000) (Scheindlin, D.J)j *Solomon v. Commissioner of Correctional Sevs.*, 786 F.Supp. 218. 226 (E.D.N.Y.1992) ("Although petitioner's counsel undoubtedly made certain errors, this record indicates that viewed in the context of the entire record, he did a reasonable job.").

In the related context of what constitute "cause" for a procedural complaint, the Supreme Court has pointed out that there is some level of attorney mistake that, though prejudicial to the defendant, does not amount to ineptitude of constitutional proportions:

*64 [T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. At least with respect to defaults that occur at trial, the Court of Appeals' holding that ignorant or inadvertent attorney error is cause for any resulting procedural default is plainly inconsistent with *Engle.* It is no less inconsistent with the purposes served by the cause and prejudice standard. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington, supra,* we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. *Murray v. Carrier,* 477 U.S. 478. 486-8 8, 106 S.Ct. 2639, 2644-45 (1986). [FN98]

> [FN98]. *See Enle v. Isaac,* 456 U.S. 107, 133-34, 102 S.Ct. 1558, 1575 (1982) ("Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every

conceivable constitutional claim."); *accord, e.g.,* *Larrea v. Bennett,* 2002 WL 1173564 at *27.

The Court, as noted above, has read the entire trial transcript. Clearly, Morris was no Clarence Darrow or Arthur Liman. But judged in context and without the benefit of hindsight, Morris' aggregated errors did not constitute ineffective assistance in violation of Quinones' Sixth Amendment rights. Moreover, applying the AEDPA standard, this Court cannot say that the First Department's rejection of Quinones' ineffective counsel claims constituted an objectively unreasonable application of Supreme Court precedent. *See* *Jones v. Stinson,* 229 F.3d 112, 121 (2d Cir.2000) (although Second Circuit might have found error had question been presented on direct review, under deferential AEDPA standard the appellate division's ruling was held not objectively unreasonable).

CONCLUSION

For the foregoing reasons, Quinones' habeas claims should be DENIED. However, because the questions of whether Morris' alleged conflict or trial performance constituted ineffective assistance of counsel are not altogether free of doubt, even when reviewed under the deferential AEDPA review standard, the Court should issue a certificate of appealability. *See, e.g.,* *Miller-El v. Cockrell,* 123 S.Ct. 1029, 1039 (Feb. 25. 2003) (" § 2253(c) permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right." 'The statute "does not require a showing that the appeal will succeed. Accordingly, a court ... should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief."); *Slack v. McDaniel,* 529 U.S. 473, 475, 120 S.Ct. 1595. 1599 (2000) (certificate of appealability should issue where "reasonable jurists could debate whether (or, for that matter, agree that) the petition

should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further" '); *Lucidore v. New York State Div. of Parole,* 209 F.3d 107. 112 (2d Cir.) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further"), *cert. denied,* 531 U.S. 873, 121 S.Ct. 175 (2000).

FILING OF OBJECTIONS TO THIS REP ORTAND RECOMMENDATION

*65 Pursuant to 28 U.S.C. 636(b)(1) and Rule 72(b) ofthe Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable William H. Pauley III, 500 Pearl Street, Room 2210, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Pauley. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Am,* 474 U.S. 140, 106 S.Ct. 466 (1985); *IUE AFL-CIO Pension Fund* v. *Herrmann, 9* F.3d 1049, 1054 (2d Cir.1993), *cert. denied,* 513 U.S. 822, 115 S.Ct. 86 (1994); *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993); *Frankv. Johnson,* 968 F.2d 298, 300 (2d Cir.), *cert. denied,* 506 U.S. 1038. 113 S.Ct. 825 (1992); *Small v. Secretaiy of Health & Human Servs.,* 892 F.2d 15. 16 (2d Cir.1989); *Wesolek* V. *Canadair Ltd.,* 838 F.2d 55, 57-59 (2d Cir.1988); *McCarthy v. Manson,* 714 F.2d 234, 237-38 (2d Cir.1983); 28 U.S.C. 636(b)(1); Fed.R.Civ.P. 72,

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1:01CV10752 (Docket) (Nov. 28, 2001)

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Motions, Pleadings and Filings

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United States District Court,
W.D. New York.

Andrew BOSTIC, *05743-055,* Petitioner,

V.

T. WILLIAMSON (Warden), U.S. of America,
Respondent.

No. 04-CV-0769E.

Sept. 30, 2004.

Andrew Bostic, White Deer, PA, pro Se.

MEMORANDUM and ORDER

ELFVIN, J.

*1 On September 22, 2004, petitioner, Andrew Bostic, an inmate at the Allenwood Medium Federal Correctional Institution, White Deer, Pennsylvania, filed *apro se* petition for habeas corpus relief (Docket No. 1) and an application to proceed *informapauperis* (Docket No. 31). Petitioner's memorandum of law filed in support of the petition (Docket No. 2) clearly states that the petition is brought under 28 U.S.C. 2241, and not 28 U.S.C. 2255. It is clear that the

petitioner intended to bring this action as a petition for habeas corpus relief under 28 U.S.C. 2241, and not as a motion to vacate, set aside or correct his sentence under 28 U.S.C. 2255, *see Chamber v. United Stales,* 106 F.3d 472, 474 (2d Cir.1997) (2255 is the appropriate vehicle for challenging the *imposition* of a sentence, while 2241 is the appropriate vehicle for challenging the execution of a sentence), in order to avoid the gate-keeping feature of 2255. This feature was added to petitions brought under 28 U.S.C. 2254 and 2255 by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. 2244(b)(1)-(3) and 2255, and requires that before a "second or successive" motion to vacate, set aside or correct a sentence under 2255 can be considered by the District Court it must be certified by a panel of the Court of Appeals. [FN1] Petitioner, while not expressly conceding that avoiding this gate-keeping feature is the reason he brought the petition under 2241, and not 2255, is certainly aware of the potential pit-falls of bringing this proceeding as a 2255 petition inasmuch as he argues that 2241 is the proper vehicle to bring his instant challenge to his conviction and sentence, and acknowledges that a motion under 2255 would meet with a timeliness defense by the government. (Docket No. 2, Petitioner's Memorandum of Law, pp. 3-4). For the reasons discussed below, the court decides not to convert the 2241 petition for habeas corpus relief to a motion to vacate, set aside or correct petitioner's sentence under 2255, and dismisses the instant petition for want ofjurisdiction.[FN2] *See Adams v. Unites States,* 372 F.3d 132, 136 (2d Cir.2004) *("Adams* II). j.

> [FN1]The certification requirement of 2255 provides: A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to cont[illegible]n-
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that no reasonable factfinder would have found the movant guilty of the offense; or
(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

[FN2]. A court must raise, *sua sponte,* the issue of subject jurisdiction when there is an indication that jurisdiction is not present. *J-fuhes v. Patroim en's Benevolent Association of the City ofNew York. Inc.*, 850 F.2d 876, 881 (2d Cir. 1988), *cert. denied488* U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988) (citations omitted).

BACKGROUND

On March 27, 1992, petitioner, following a plea of guilty, was convicted of one count of conspiracy to possess heroin in violation of 21 U.S.C. 844(a) and and two counts of using a communications facility to commit a felony in violation of 21 U.S.C. 843(b), and was sentenced to a total of 108 months; all three sentences ordered to be served consecutively. In 2001, petitioner brought a motion under Rule 35 of the Federal Rules of Criminal Procedure and/or 28 U.S.C. 2241 regarding the concurrent/consecutive sentence issue. This motion, and a motion for reconsideration, were denied without prejudice to the filing of a motion under 2255, and in the orders denying said motions, the court informed petitioner that his sole remedy for challenginghis sentence arose under 28 U.S.C. 2255, and that, because he was likely to be time-barred under 2255, he should address the timeliness issue in any motion under 2255 he might file. *(Bostic v. U.S.,* 02-CV-0381E, *U.S. v. Bostic,* 91-CR-212E-01, Docket No. 24, Memorandum and Order, n. 1). [FN3]

[FN3]. At that time filings were made in both the civil docket opened for purposes of the . 2255 motion, and the previously opened criminal docket.

*2 On May 23, 2002, petitioner filed a motion under 2255 seeking to vacate his sentence and raised the following grounds: (1) the court lacked jurisdiction to convict petitioner of the offenses under 21 U.S.C. 843(b), because the underlying offense of conspiracy to possess heroin to which he pled guilty is not a felony, [FN4] (2) counts two and three of the superseding indictment, which charged petitioner with violations of 21 U.S.C. 843(b), were jurisdictionally defective because the underlying offense of conspiracy to possess heroin to which petitioner pled guilty is not a felony; (3) the court erred when sentencing petitioner as a "career offender," and (4) petitioner was denied effective assistance of counsel. *(Bostic v. United States,* No. 02-C V-03 8 1E, *US. v. Bostic,* 9 1-CR-02 12E-0 l,Docket No. 23, Motion Under 28 U.S.C. 2255 to Vacate, Set Aside or Correct Sentence, Grounds One-Four, p. 9). On May 31, 2002, the court dismissed the motion as untimely and denied petitioner a certificate of appealibility. *(Id.,* Docket No. 24, Memorandum and Order). In September2002, the Second Circuit Court of Appeals denied both petitioner's request for a certificate of appealibility and request to proceed *in forma pauperis* on appeal, and dismissed petitioner's appeal. *(Id.,* Docket No. 28, Order of Court of Appeals).

[FN4]. The original indictment charged petitioner with two counts of unlawfully possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1)(a) two counts of using a communication device to commit felonies under 21 U.S.C. 841(1)(a), in violation of 21 U.S.C. 843(b) and one count of conspiracy to possess heroin with intent to distribute, in violation of21 U.S.C. 841(a)(1)(a), all in violation of 21 U.S.C. A superseding indictment to which

> petitioner pled guilty, charged petitioner with one count of conspiracy to possess heroin in violation of 21 U.S.C. 844(a), all in violation of 21 U.S.C. 846 and two counts of using a communication device to commit felonies under 21 U.S.C. 841(l)(a), and a conspiracy to do so, in violation of 21 U.S.C. 843(b).

Petitioner has now filed the instant petition under challenging his sentence on the following grounds, which are the same or similar grounds he raised in his previous 2255 motion: (1) the court had no jurisdiction to convict him of the offenses under 21 U.S.C. 843(b) because the offense of conspiracy to possess heroin to which he pled guilty is not a felony; (2) the prosecutor abused his authority in charging petitioner with a violation of 21 U.S.C. 843(a) knowing that the underlying offense, to wit: conspiracy to possess heroin, did not support a charge under 843(a) and (3) ineffective assistance of counsel. (Docket No. 1, Petition for Writ of Habeas Corpus, pp. 3-4).

DISCUSSION

As noted, a motion under 5 *2255* is the vehicle for challenging the *imposition* ofa sentence, *see C'hambers,* 106 F.3d at 472. whereas a petition under 5 2241 is used to challenge the *execution* of a sentence. *See Jiininian v. Nash,* 245 F.3d 144, 146 (2d Cir.2001). The petition in this case clearly challenges the imposition of petitioner's sentence and, therefore, should have been brought as a motion under 5 2255. The initial question, therefore, is whether the court can convert the instant petition to a motion under 5 2255 and, if so, whether the court can convert it without first providing petitioner notice of the court's intention and provide him an opportunity to withdraw it because of the gate-keeping features of AEDPA. *See Casto v. United States,* 540 U.S. 375. 124 S.Ct. 786, 157 L.Ed.2d 778 (2004); *Adams v. US.,* 372 F.3d at 136 *see also, Adams v. US.,* 155 F.3d 582, 584

(2d Cir.1998) ("*Adams* I") (a district court should not convert a post-conviction *pro se* application without first providing notice to the prisoner and giving him opportunity to withdraw petition). Secondly, and regardless of whether or not the court can convert, can the court dismiss the 5 2241 for lack of jurisdiction rather than convert and transfer (refer) the motion to the Court of Appeals for certification since it is a second or successive motion. These issues are directly addressed by the Second Circuit Court of Appeals' decision inA *dams,* 372 F.3d at 135-36. and, pursuant to the holding in that case, this Court will dismiss the .petition for lack ofjurisdiction rather than convert it to a 5 2255 motion and transfer it to the Court of Appeals. [FN5]

> [FN5]Because the Court is dismissing the petition for want of jurisdiction, it need not address the venue issue. See 28 U.S.C. S 2243.

1. *Is a §2241 Petition Available to Petitioner*

*3 An exception to the rule that the proper remedy for challenging the *imposition* of a criminal sentence is if a 52255 motion is "inadequate or ineffective to challenge [the] deterntion." *See* 28 U.S.C. § 2255; *Triestmnan v. United Stales,* 124 F.3d 361, 373 (2d Cir.1997). In *Adams* II, the Court of Appeal: reiterated its holding in *Triesiman:* "§ 2255 may be inadequate or ineffective in circumstances where a prisoner cannot avail himself of § 2255, and where the failure to obtain collateral review raises serious constitutional questions." 372 F.3d 135 (citing *Triestman,* 124 F.3d at 377). The exception does not apply where a "petition does not raise serious constitutional questions because [petitioner] has not alleged actual innocence and all of his arguments could have been raised ... in prior proceedings." *Adams,* 372 F.3d at 135-36. The Court of Appeals has also held that a 5 2255 motion is not inadequate or ineffective "simply because the prisoner cannot meet the AEDPA's gate-keeping requirements, so

long as the claim the prisoner seeks to raise was previously available to him on direct appeal or in a prior § 2255 petition." *Adams,* 372 F.3d at 135 (citing *Jiminian,* 245 F.3dat 147-48). Moreover, amotion that is dismissed on the grounds that it is untimely, is a disposition on the merits and, therefore, a subsequent motion under 5 2255 is treated as a second or successive motion under the gate-keeping feature of 2255. *J7illenueva v. United States,* 346 F.3d 55, 60-61 (2d Cir.2003).

This Court finds that petitioner is not entitled to rely on the exception because he is not presenting a claim of actual innocence and he could have raised the claims raised in the instant petition-and did-in prior proceedings. As noted above, petitioner had previously filed a motion under § 2255 raising similar, if not identical grounds, which was dismissed on timeliness grounds. The previous § 2255 motion had raised the jurisdictional issues raised herein, as well as an ineffective assistance of counsel claim based on counsel's alleged failures related to the jurisdictional and career offender issues, which is similar, if not identical to ineffective assistance of counsel claim raised *herein--viz.,* that counsel erred by allowing him to plead guilty to the offenses under 21 U.S.C. § 843(a) because it was not jurisdictionally supported by the underlying offense for which petitioner was convicted. *(See Bostic v. United States,* No. 02-CV-03 8 1E, *U.S. v. Bostic,* 91 -CR-2 12E-0 1, Docket No. 23, Motion Under 28 U.S.C. 5 2255 to Vacate, Set Aside or Correct Sentence). Accordingly, the petitioner was not entitled to file the instant petition under 2241 because the proper remedy to challenge the imposition of his sentence is a motion under § 2255.

2.) *Conversion of this§' 2241 Petition to a Motion Under§ ' 2255 or Dismissal of.§ 2241 Petition*

In Adams L *155* F.3d at 584, the Court of Appeals held that a district court should not *sua sponte* convert a post-conviction application into a motion under § 2255 without first giving the prisoner notice of the court's intention to convert and the opportunity to withdraw the § 2255 motion. In *Jimninian,* however, the Second Circuit held that the district court need not give notice of the conversion and an opportunity to withdraw if the prisoner has already had a previous § 2255 motion dismissed on the merits and, therefore, the court should treat the § 2255 motion as a second or successive motion and transfer it the Court for certification. 245 F.3d at 148z *see also Adams,* 372 F.3d at 136 (explaining and restating holding in *Jimninian*). As noted, a dismissal on timeliness grounds is a dismissal on the merits for purposes of the gate-keeping provision of § 2255, *Villanueva,* 346 F.3d at 61, and, therefore, the court can freely transfer the § 2241 petition to a motion under § 2255 without first providing notice to petitioner and giving him an opportunity to withdraw the motion.

*4 In *Cephas v. Nash,* 328 F.3d 98, 104 (2d Cir.2003), the Second Circuit introduced the alternative disposition of dismissal of the improperly filed § 2241 petition instead of transfer of the converted § 2255 motion to that Court. The Court held "that if a prisoner moving under § 2241 cannot make the necessary showing that a § 2255 motion is 'inadequate or ineffective,' the district court 'must either dismiss the habeas petition for lack ofjurisdiction or recast it as a 2255 motion.' *"Adams,* 372 F.3d at 136 (quoting *Cephas,* 328 F.3d at 104). In *Adams* II, the Court of Appeals clarified its holdings in *Cephas* and *Jiminian,* and held that "either option[, dismissal or conversion and transfer,] may be utilized by a district court when a prisoner files a § 2241 petition in an attempt to evade . 's limits on second or successive petitions, and when the petitioner has already had a prior § 2255 petition dismissed on the merits." That is to say, the district court can treat the § 2241 petition as a second

or successive § 2255 motion and refer the petition to the Court of Appeals] for certification, or, if it is plain from the petition that the prisoner cannot demonstrate that a remedy under § 2255 would be inadequate or ineffective to test the legality of his detention, the district court may dismiss the § 2241 petition for lack of jurisdiction. *Adams,* 372 F.3d at 136.

As discussed above, the Court finds that it is clear from the petition that petitioner cannot demonstrate that a § 2255 motion would be inadequate or ineffective to test the legality of his present detention because the petition does not raise a serious constitutional question and the issues raised in the instant petition could have been raised--and were raised--in an earlier motion under . 2255. Accordingly, the Court will take the alternate disposition of dismissal suggested in *Cephas* and dismiss the instant petition under § 2241. [FN6]

> [FN6]. It is clear that if the court did convert the petition to a motion under § 2255, it would be untimely and petitioner has presented no grounds for equitable tolling of the one year period of limitations set forth in AEDPA. 28 U.S.C. § 2255.

CONCLUSION

Petitioner's application to proceed *informapauperis* is grantedandthepetitionfiledunder28 U.S.C. 2241 is hereby dismissed for lack ofjurisdiction.

SO ORDERED.

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2004 WL 1944021 (D.Conn.)
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United States District Court, D. Connecticut.

Jamila DIAZ, Petitioner,

V.

Kuma J. DEBOO, Respondent.

No. 3:04CV1321(SRIJ).

Aug. 31, 2004.

Jamila Diaz, Danbury, CT, pro Se.

RULING ONPETITIONFOR WRIT OF HABEAS CORPUS

UNDERHILL, J.

*1 The petitioner, Jainila Diaz ("Diaz"), is currently confined at the Federal Correctional histitution in Danbury, Connecticut. She brings this action for a writ of habeas corpus, pursuant to 28 U.S.C. 2241. The court concludes that it lacks jurisdiction under section 2241 to entertain Diaz' claims.

Procedural Background

Diaz was convicted, pursuant to a plea bargain, in the United States District Court for the Eastern District of New York and sentenced to a term of imprisonment of 96 months. She did not appeal her conviction or file any motion pursuant to 28 U.S.C. § 2255.

By petition certified as mailed on July 29, 2004, Diaz coimnenced this action pursuant to 28 U.S.C. § 2241. She challenges her conviction on several grounds relating to the jurisdiction of the court in which she was convicted. Diaz claims that she was convicted in a court of admiralty that lacked jurisdiction to hear her case. She contends that a court of admiralty is identified by a flag with a fringe around it. Diaz also argues that she was convicted for violating a civil, not a criminal, statute because the statutes in her indictment were from Title 21 of the U.S.Code, not Title 18 which, she assumes, contains all of the criminal statutes.

Discussion

As an initial matter, the court must determine whether it has jurisdiction to entertain Diaz' claim in a petition filed pursuant to 28 U.S.C. § 2241.

Since the enactment of the Judiciary Act of 1789, the federal court in the district in which a prisoner is incarcerated has been authorized to issue a writ of habeas corpus if the prisoner was in custody under the authority of the United States. *See Triestman v. Uniled States,* 124 F.3d 361, 373 (2d Cir.1997). Today, this authority is codified at 28 U.S.C. 2241 (c)(3). In 1948, however, Congress enacted 28 U.S.C. § 2255. That statute "channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confmement) so that they can be addressed more efficiently." *Id.*

Currently, "[a] motion pursuant to [sectioni 2241] generally challenges the *execution* of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir.2001) (citing *Chambers v. United Slates*, 106 F.3d 472. 474-7 5 (2d Cir. 1997) (describing situations where a federal prisoner would properly file a section 2241 petition)). A section 2255 motion, on the other hand, is considered "the proper vehicle for a federal prisoner's challenge to [the imposition of] his conviction and sentence." *Id.* at 146-47. Thus, as a general rule, federal prisoners challenging the imposition of their sentences must do so by a motion filed pursuant to section 2255 rather than a petition filed pursuant to section 2241. *See Triesiman*, 124 F.3d at 373.

*2 Tn her section 2241 petition, Diaz challenges her conviction, a claim properly raised in a section 2255 motion, and, hence, with the sentencing court in New York. Section 2255 contains a "savings clause" that "permits the filing of a [section 2241 petition when [section 2255 provides *an inadequate or ineffective remedy* to test the legality of a federal prisoner's detention." *Jiminian, 245* F.3d at 147 (emphasis added).

Diaz assumes that she cannot file a motion pursuant to section 2255 because there has been no substantive change in the law. A change in the law is not a prerequisite to filing a section 2255 motion. In addition, because Diaz indicates that she has not filed a motion pursuant to section 2255 in the sentencing court, section 5 may still be available to her. [FN1] The court concludes that the "savings clause" exception does not apply in this case. Thus, the District of Connecticut lacks jurisdiction to entertain Diaz' section 2241 petition.

> [FN1]. The court notes that 28 U.S.C. § 2255 contains a one-year statute of limitations. Although it appears that the limitations period may have run in this case, there are exceptions to the statute of limitations as well as the possibility of equitable tolling. *See* 28 U.S.C. 2255W-(4); *Green v. United States.* 260 F.3d 78, 82 (2d Cir.2001) (citing *Smith v. McGinnis,* 208 F.3d 13 (2d Cir.), *cert. denied,* 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 63 (2000). If appropriate, Diaz may raise these arguments with the sentencing court.

The Second Circuit has held that, when a petitioner already has filed a section 2255 motion, the district court may construe a petition filed pursuant to section 2241 as a second section 2255 motion and transfer the motion to the Court of Appeals to enable that court to determine whether certification to file a second petition should be granted. *See Ji,ninian.* 245 F.3d at 148-49. When, as here, the petitioner has not previously filed a section 2255 motion, the court should follow the procedure set forth in *Adams v. United States,* 155 F.3d 582, 5 83-84 (2d Cir.1998).

In *Adams,* the Second Circuit held that, if the petitioner has never filed a section 2255 motion, the district court may not simply construe a petition for writ of habeas corpus brought pursuant to section 2241 as a section 2255 motion without providing notice to the petitioner. Thus, prior to recharacterizing a section petition as a section 2255 motion, this court must permit the petitioner either to: (1) agree to the recharacterization of her petition as a section 2255 motion, with the understanding that the matter will be transferred to the sentencing court; or (2) withdraw the petition "rather than have it so recharacterized. *"Adams,* 155 F.3d at 584. *See Castro v. United States.* 540 U.S. 375. ----, 124 S.Ct. 786. 792, 157 L.Ed.2d 778 (2003) (agreeing with circuits that have adopted this warning procedure before characterizing a section 2241 petition as a first section 2255 motion).

Conclusion

On or before September 27, 2004, Diaz shall file a Notice in which she either: (1) agrees to the recharacterization of her petition as a section 2255 motion with the understanding that the matter will be transferred to the United States District Court for the Eastern District of New York; or (2) withdraws the petition rather than have the court recharacterize it as a section 2255 motion. If Diaz fails to respond to this order, the court will recharacterize this petition as a section 2255 motion and transfer it to the Eastern District of New York.

*3SO ORDERED.

2004 WL 1944021 (D.Conn.)

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United States District Court, D. Connecticut.

Delinda Vianne ROGERS, Petitioner,

V.

Kuma J. DEBOO, Respondent.

No. 3:04CV619(CFD).

June 24, 2004.

DeLinda ViAnne Rogers, Danbury, CT, pro se.

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

DRONEY, J.

*1 The petitioner, DeLinda ViAnne Rogers ("Rogers"), is currently confined at the Federal Correctional Institution in Danbury, Connecticut. She brings this action for a writ of habeas corpus, pursuant to U.S.C. § 2241. The court concludes that it lacks jurisdiction under section 2241 to entertain Rogers' claims.

Procedural Background

Rogers was convicted in 1990 in the United States District Court for the Western District of Missouri, Southern Division for an unspecified drug offense under Title 21 of the United States Code. She was sentenced to a term of imprisonment of 248 months. In approximately March 1996, the Court of Appeals for the Eighth Circuit granted her motion to vacate a portion ofher sentence and reduced Rogers' sentence by sixty months.

By petition dated March 25, 2004, and certified as mailed on March 29, 2004, Rogers commenced this actionpursuantto 28 U.S.C. § 2241. She challenges her conviction on several grounds relating to the jurisdiction of the court in which she was convicted. Rogers claims that she was convicted in a court of admiralty and that she was convicted for violating a civil, not a criminal, statute.

Discussion

As an initial matter, the court must determine whether it has jurisdiction to entertain Rogers' claim in a petition filed pursuant to 28 U.S.C. § 2241. For the reasons that follow, the court concludes that it does not have jurisdiction.

Since the enactment of the Judiciary Act of 1789, the federal court in the district in which a prisoner is incarcerated has been authorized to issue a writ of habeas corpus if the prisoner was in custody under the authority of the United States. *See Triestman v. United States,* 124 F.3d 361, 373 (2d Cir.1997). Today, this authority is codified at 28 U.S.C § 2241(c)(3'). In 1948, however, Congress enacted 28 U.S.C. 2255. This statute "channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently." *Id.*

Currently, "[a] motion pursuant to [sectioni 2241] generally challenges the *execution* of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash,* 245 F3d 144, 146 (2d Cir.2001) (citing *C'hambers v. United States,* 106 F.3d 472,474-75 (2d Cir. 1997) (describing situations where a federal prisoner would properly file a section 2241 petition)). A section 2255 motion, on the other hand, is considered "the proper vehicle for a federal prisoner's challenge to [the imposition of] his conviction and sentence." *Id* . at 146-47. Thus, as a general rule, federal prisoners challenging the imposition of their sentences must do so by a motion filed pursuant to section *2255* rather than a petition filed pursuant to section 2241. *See Triestman,* 124 F.3d at *373.*

*2 In her section 2241 petition, Rogers challenges her conviction, claims properly raised in a section 2255 motion, and, hence, with the sentencing court in Missouri. Section 2255 contains a "savings clause" which "permits the filing of a [sectioni 2241 petition when [sectionl 2255] provides *an inadequate or ineffective remedy* to test the legality of a federal prisoner's detention." *Jiminian,* 245 F.3d at 147 (emphasis added); *see also, e.g., Tucker v. Nash,* No. 00-CV-6570(FB), 2001 WL 761198, at * 1 (E.D.N.Y. June 29, 2001) (referring this section as the "'savings clause' of 2255").

Rogers does not argue that section 2255 is inadequate and ineffective and does not indicate that she has attempted to file a successive section 2255 petition in the sentencing court. The court concludes that the exception does not apply in this case because section 2255 relief still is available to Rogers. Thus, the District of Connecticut lacks jurisdictionto entertain her section 2241 petition.

The Second Circuit has held that, where a petitioner already has filed a section 2255 motion, the district court may construe a petition filed pursuant to section 2241 as a second section 2255 motion and transfer the motion to the Court of **Appeals** to enable that court to determine whether certification to file a second petition should be granted. *See Jiminian,* 245 F.3d at 148-49. Rogers was convicted in the United States District Court for the Western District of Missouri, Southern Division. Thus, transferring this case to the Second Circuit would serve no purpose. In the interests of justice, the case is hereby transferred to the United States District Court for the Western District of Missouri, Southern Division, for whatever action that court deems appropriate. *See* 28 U.S.C. 1406(a) (permitting a district court, in the interest ofjustice, to transfer a case to a district in which it could have been brough *White v. Wiley.* No. 9:99-CV-1 147 DNH GLS, 2001 WL 1860962, at *3 (Feb. 15, 2001)

("Where habeas claims are raised in the wrong judicial district, a court may dismiss or transfer such claims' pursuant to 28 U.S.C. 1406(a)) (unpublished decision).

Conclusion

Based on the foregoing, the court concludes that it lkcks jurisdiction to entertain Rogers' petition pursuant to section 2241. The petition is hereby transferred to the United States District Court for the Western District of Missouri, Southern Division, in Springfield, Missouri.

SO ORDERED.

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